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MEDICAL JURISPRUDENCE

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A STATEMENT OF THE LAW
OF
FORENSIC MEDICINE

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THIRD EDITION

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PREFACE TO THIRD EDITION

Since 1895, the writer has been delivering a course of lectures on the subjects involved in this production, but during that time he has not been able to find a satisfactory text on the legal phases of the subject for recommendation to medical students and general practitioners. The medical features have been thoroughly discussed by many writers. Whatever the merit of this effort in supplying the desideratum, it embodies a brief explanation of those phases of the subject which the author found most interesting and instructive to the student and useful to those who are in the practice of the profession. No effort has been made to exhaust the subject but rather to abridge and condense wherever possible without sacrifice to completeness of exposition and accuracy in elucidation of fundamental principles.

Liberal reference has been made to the authorities sustaining or justifying the propositions set forth and, while seldom quoting from decisions, the writer, wherever expedient and appropriate, has not hesitated to adapt the language of the courts in announcing and illustrating principles. References on important subjects are made to annotated cases where the student will find fuller illustrations of the application of the law to facts in adjudicated cases. The references to L.R.A. are to the new series unless otherwise indicated, and American and English Annotated Cases are cited as A.C.

Technical matters, useful only to lawyers, are not discussed. The work is not intended as a text for lawyers, but by use of the index and reference to the text, the legal practitioner may get a line on the authorities relating to matters he has under investigation. The subject has been developed from law texts, encyclopedias, reports and decisions. The medical student and practitioner will find the text to be practical statements of the general principles and rules announced by the courts in dealing with medical matters and relations, as the same have come before them for adjudication.

Medical subjects are not discussed except where considered necessary to an exposition of the legal aspects or to illustrate the application of the legal principles announced.

ELMER D. BROTHERS.

Chicago, 1930.

CONTENTS

CHAPTER I

INTRODUCTION

Law.—Municipal Law.—Criminal Law.—Civil Law.—Criminal Action and Civil Suit.—Substantive Law.—Administrative Law.—Development of Medical Science.—The Physician and the Courts.—Definition of Medical Jurisprudence 17–26

CHAPTER II

COURTS AND PROCEDURE

Courts. — Jurisdiction. — Notice. — Procedure. — Processes.—Trial.—Jury.—Trial by Ordeal.—Constitutional Guarantees 27–32

CHAPTER III

EVIDENCE

Definition.—Testimony.—Witness.—Oath or Affirmation.—Competency of Evidence.—Subjects of Testimony.—Facts.—Opinions 33–37

CHAPTER IV

RULES OF EVIDENCE

Definition.—Basic Principles.—Hearsay.—Statements against Interest.—Dying Declarations.—Reasons for Exception.—Conditions of Admissibility.—Res Gestæ.—Statements by Patient to Physician.—Pain and Suffering 38–45

CHAPTER V

RULES OF EVIDENCE

Privileged Communications.—At Common Law.—Statutes. — Provisions. — Purposes. — Interpretation. — Incidental Information.—Patient Need Not Be Party to Suit.—Statement by Physician to Patient.

—Waiver of Privilege.—Privilege Is an Entirety.—Autopsy.—Duty of the Physician.—Privilege Not to Protect Criminals.—Criminal Purposes.—Presumption of Good Faith.—Statements against Interest.—Adverse Statements.—Adverse Statements in the Presence of a Party 46–52

CHAPTER VI

EXPERT WITNESS

Definition.—Preliminary Inquiry as to Qualifications.—Conduct.—Confined to Special Knowledge.—Physicians as Experts.—Subjects of Inquiry.—Basis of Opinion.—Hypothetical Question.—Symptoms.—Cross Examining of Expert.—Medical Books in Evidence.—Status of Expert Witness 53–61

CHAPTER VII

LICENSE

Definition.—Common Law Right.—Right to Pursue Calling.—Public Welfare.—Control by State.—How Regulated.—Requirements.—Requirements Must Be Reasonable.—Soliciting Patients.—Itinerant Vendors of Medicines.—Itinerant Physicians.—City License.—Christian Science.—Miscellaneous Practitioners.—Itinerant Patient.—Optician.—Right of Physician to Practice Dentistry.—Exemption of Resident Practitioners.—Board Cannot Delegate Discretion.—Revocation.—Professional Practice Is Not Property.—Vested Rights.—Constitutional Provisions.—Revocation Not a Judicial Function.—Grounds for Revoking.—Construction of License Statutes.—Practicing without License.—Practicing Medicine.—Proceedings to Revoke.—Charges.—Notice.—Evidence.—Defense.—Record.—Effect of Decision by Board.—Statutes of Limitation.—Revocation and Criminal Prosecution.—Pardon . 62–80

CHAPTER VIII

CONTRACTUAL RELATIONS

General Observations.—Contract.—Kinds.—Delivery.—Other Classes.—Mutuality.—Parties.—Contracts by Infants.—Persons under Legal Disability.—Consideration.—Effect of Signing Contract.—Validity of Contracts.—Constitutional Right to Contract.—Guaranty.—Receipt.—Release 81–89

CHAPTER IX

EMPLOYMENT AND COMPENSATION

Accepting Service.—Unconscious Patient.—Employment by Third Person.—History.—Agreement as to Fee.—No Agreement as to Fee.—Benefit to Patient.—Proper Treatment Required.—Detriment to Physician.—Special Agreement as to Result.—Services During Life of Patient.—Frequency of Visits.—Value of Services Is a Question of Fact.—What May Be Shown.—Previous Charges.—Professional Standing.—Communication of Infectious Diseases.—Bill Less Than Present Claim.—What May Not Be Shown.—Financial Circumstances of Patient or Physician.—License Presumed.—Unlicensed Practitioners.—Nature of Remedies Must Be Disclosed if Sought.—What Physician Must Prove.—How Proven.—Effect of Opinions.—Husband and Wife; Parent and Child; Guardian and Ward.—Necessaries.—Medical Services Are Necessaries.—Husband Selects Physician.—Family Expense.—Parent and Child.—Child Special Agent of Parent.—Liability of Mother.—Ratification.—Malpractice.—Malpractice as a Defense to an Action for Services.—Effect of Judgment for Fees.—Consultant.—Witness Fees.—Expert Witness Fees.—Special Preparation.—When Not Subpœnaed.—Extra Fees for Extra Services.—Post-mortem for Coroner . . . 90–108

CHAPTER X

AGREEMENT FOR SURGICAL OPERATION

Essentials.—Implied Stipulations.—Nature of Agreement.—Consent Necessary.—Whose Consent.—Husband and Wife.—Parent and Child.—Emergency.—Surgeon's Discretion.—Motive.—Presumptions.—From Consent and Circumstances.—From Surgeon's Duty.—Controlling Facts.—Emergency.—More Than One Method.—Patient's Conclusion Paramount.—Operating at Patient's Request.—Good Faith of Operator.—Departure from Agreed Operation.—Question of Fact.—Surgeon, Agent for Patient.—Prohibited Act or Operation.—Damages for Unauthorized Operation.—Unauthorized Autopsy 109–124

CHAPTER XI

RES IPSA LOQUITUR

The Maxim.—Basis of the Maxim.—Presumptions.—Kinds.—Presumption upon Presumption.—Mental Convictions.—Application of the Maxim.—The Reasons for the Rule.—When Maxim Is Applicable.—History and Illustrations.—Effect from More Than One Cause.—As Applied to Physicians and Surgeons.—Sponge Cases.—Death from Anesthetic.—As Applied to Dentists.—Where Not Applicable.—Infection 125–134

CHAPTER XII

OBLIGATIONS IMPOSED BY LAW

Origin of Duty and Law.—Involuntary Relations.—Voluntary Relations.—Measure of Duty.—Implied Conditions of Relation.—Public Policy.—Statement of the Obligations.—Obligation Measured by Liability.—Requirement Is General.—Degree of Skill Required.—Measure of Skill.—Ordinary Skill.—Best Skill.—Highest Skill.—Average Skill Not Required.—Not the Skill of the Educated Only.—Only the Competent Considered.—Locality and Time Affect Skill Required.—Ailment Treated.—Proof of Skill.—Inference of Want of Skill.—Skill at Time of Service.—Degree of Care Required.—Measure of Care.—Ordinary Care.—Highest Care.—Carelessness—Misconduct.—Carelessness Never Excused in Law.—Nature of Judgment Required.—Requirements Stated.—Latitude of Discretion.—No Guaranty That Judgment Is Correct.—Different Methods.—Dual Purpose.—Presumptions of Skill, Care and Judgment.—Inferences from Injurious Results.—Assumption of Risk.—Agreement Waiving These Requirements.—Agreement for Special Skill.—Specialists.—Practitioner Must Keep Pace with the Times. — Experimentation. — Established Treatment. — Gratuitous Services. — Non-Professional Volunteer.—Publishing Operation.—Imposing on Privacy.—Confidence and Public Duty.—Unlicensed Practitioner 135–157

CHAPTER XIII

CIVIL MALPRACTICE

Definition.—Essentials of Liability.—Propriety of Treatment.—Negligence.—Intent.—Good Faith.—Accident.—Liability for Accident.—Accident and Negligence.—Contributory Negligence.—Effect.—Reasons for the Rule.—Temperament.—Failure to Obey Instructions.—Independent Services.—Nurse's Negligence.—Physician and Dentist.—Negligence of Druggist.—Negligence of Assistant or Apprentice. —Partners.—Negligence of Substitute.—Recommendation.—Practitioner Not a Guarantor of Beneficial Results.—Intoxication.—Physician Engaged in Other Avocations.—Other Engagements.—Selection of Hospital.—Office Practice.—Frequency of Visits.—Arbitrary Refusal to Take Case.—Statutes Do Not Require Licentiates to Practice.—Civil Rights Acts.—Purposes.—Application.—Physicians 158–169

CHAPTER XIV

CIVIL MALPRACTICE

Proof Necessary to Establish Malpractice.—Anesthetic, Refusal to Give.—Mistake in Diagnosis.—Purpose of Diagnosis.—Inquisition of Sanity.—Usual Results Not the Test of Duty.—How Proven.—Failure to Take X-ray.—Burden of Proof.—Preponderance of Evidence.—Need Not Exclude All Probable Causes.—Infection Following Treatment.—Different Schools of Medicine.—Failure to Present Bill, No Admission of Wrong.—Exhibiting Injury.—When the Relation Begins.—Prompt Response to Call.—When the Relation Ends.—Malpractice a Question of Law.—Physician Ordering Patient to Hospital 170–179

CHAPTER XV

CIVIL MALPRACTICE

Defenses.—Proper Treatment.—Former Judgment for Physician.—Injury from Other Causes.—Reputation.—One Suit—One Recovery.—Mistake Caused by Patient.—Damages.—Kinds.—Presumptions.—Amount Recoverable.—Elements of Damages.—Patient's Duty to Prevent Aggravation of Injury.—Reduce Damages—Surgical Aid.—Mere Contingencies.—Cannot Recover for Original Injury or Disease. — Mitigation. — Aggravation. — Excessive Damages.—Form of Action.—Reason for Alleging Contract.—Death from Malpractice.—Damages.—

Joint and Several Actions.—Joint Services—Joint Liability. — Independent Acts. — Physician and Druggist.—Assistant to Surgeon.—Contribution.—Satisfaction.—Agreement Not to Sue.—Survival of Action.—Release 180–191

CHAPTER XVI

CRIMINAL MALPRACTICE

Definition.—Criminal Liability.—Abortion.—Criminal Abortion.—At Common Law.—Attempt to Abort. — Intent. — Without the Woman's Consent. — Knowledge of Pregnancy.—Pregnancy Not Necessary to Attempt to Abort.—Means Employed.—Failure to Produce Abortion.—Advice to Procure Abortion.—Proof of Pregnancy.—State of Pregnancy.—Period of Pregnancy.—Fact of Pregnancy. —Evidence.—Statutes.—Necessary to Save the Mother's Life.—Necessity.—Advice of Physician.—Civil Liability.—Distinction between Civil and Criminal Malpractice 192–201

CHAPTER XVII

FALSE REPRESENTATIONS

Fraud. — Definition. — Effect. — Intent. — Corrupt Motive.—Materiality.—Opinions.—Caveat Emptor.—Peculiarity of the Relation.—Trust and Confidence. —Confidential Relations and Special Knowledge.—False Pretenses.—Misstating Improvement.—Fair Dealing.—False Advertisements.—Third Party.—Illustrations of the Principle.—Certainty of Proof.—Elements of the Tort.—Remedies.—Damages.—False Representations by Patients 202–214

CHAPTER XVIII

ANESTHETICS

Definition.—Kinds of Anesthetics.—Effects of Anesthetics.—Right to Administer.—Selection of Anesthetic. —Duty to Administer Anesthetic.—Legal Responsibility in Administering Anesthetics.—Extreme Responsibility in Fact.—Death from Anesthetic.—Value of Testimony 215–219

CHAPTER XIX

INSANITY.—MENTAL FACULTIES

Mental Processes.—Cerebral Cortex.—Classification.—Choice.—Functional Disturbances and Mental Phenomena.—The Law.—Insanity in Law.—Presentation.—Definition.—Presumption of Sanity.—Presumption of Continuity of Insanity.—Evidence as to Insanity.—Suicide as Evidence.—Absence of Motive for Crime.—General Practitioner Is an Expert on Insanity 220–225

CHAPTER XX

INSANITY.—IN CRIMINAL LAW

Intent.—At Common Law.—Homicide.—Tests.—Subjects of Inquiry.—Insane Delusion.—Delirium Tremens. — Somnambulism or Somnambulentia. — Drunkenness.—Epilepsy.—Degree of Proof Required.—Moral Insanity.—Irresistible Impulse.—Emotional Insanity.—Kleptomania.—Statute . . 226–232

CHAPTER XXI

INSANITY.—IN CIVIL LAW

Validity of Contracts.—Purpose.—Necessaries.—Degree of Insanity Invalidating Contracts.—Marriage.—Delirium Tremens.—Drunkenness.—Impaired Faculties.—Validity of Wills.—Mental Capacity.—Insane Delusion.—Undue Influence.—Sound Mind and Memory.—Responsibility for Torts.—Homicide.—Damages 233–238

CHAPTER XXII

WOUNDS

Definition.—Surgically.—Character of Wounds.—Cause of Death from Wounds.—Relation of Wound to Death. — Shock. — Definition. — Symptoms. — Inflicted in Malice.—Opinions of Physicians.—Result of Treatment 239–242

CHAPTER XXIII

BLOOD STAINS

Definition of Blood.—Classification.—Origin.—Color of Blood.—Weight, or Specific Gravity.—Quantity.—Composition.—Coagulation.—Tests for Blood.—Color of Blood Stains.—Use in Criminal Law.—Testimony.—Demonstrative Evidence 243–249

CHAPTER XXIV

CRIMES WITH MEDICAL ASPECTS

Introduction.—Rape.—Definition.—Age of Consent.—Punishment.—Physical Violence.—Force.—Previous Unchastity of the Woman.—Signs.—Poisoning.—Definition.—Malice.—Absorption.—Common Law.—Post-mortem.—Murder by Poisoning.—Infanticide.—Definition.—Duty of the Mother.—Prevalence.—Intent.—Independent Existence.—Severance of Umbilical Cord.—Medical Evidence of Independent Existence.—Natural Causes of Death.—Identity of Mother.—Burden of Proof.—Statutes 250–261

CHAPTER XXV

STATUTES OF LIMITATIONS

Policy of the Law.—When Cause Accrues.—Malpractice Cases.—Period of the Statutes.—Diligence.—Specified Services.—Knowledge of Injury.—Latent Injuries.—Continuing Obligations.—A Continuing Wrong.—Constructive Discovery.—Suit for Fee.—Persons under Disability 262–267

CHAPTER XXVI

MISCELLANEOUS

Work on Sunday.—Duration of Day.—At Common Law.—Statutes.—Limited to Certain Callings.—Construction.—Work of Necessity and Charity.—Meaning of Necessity.—Services of Physician.—Coroners.—Duties.—Civil Liability.—Boards of Health.—Civil Liability.—Liability of City.—Duty of Parent to Employ Medical Services for Minor Child.—Christian Science.—Religious Belief.—Feigned Diseases.—Possibilities.—Contracts in Restraint of Professional Practice.—Prevalence.—Validity.—Ancillary to Employment.—Specific Performance.—Reason for the Relief.—Contract in Writing.—Illustrations.—Injunctions.—Asexualization and Sterilization.—Summary.—Vaccination.—Police Power.—Statutory Provisions for Vaccination.—Enforcement of Statutes.—Vaccination a Preventative.—Opposing Theories.—Public Schools.—Employing Health Officers.—Charitable Institutions.—Basis of Liability.—Inmates of Public Hospitals.—Right of Physician to Practice in Hospital.—Exclusion of Physician from Hospital.—Jury Service.—Libel and Slander.—Gifts and Legacies.—Narcotic Drugs.—Intoxicating Liquors 268–292

MEDICAL JURISPRUDENCE

CHAPTER I

INTRODUCTION

Law.—In its broadest sense, *Law is a mode of existence or an order of sequence.*[1] As such it exists and controls without reference to our knowledge or understanding. There is a limit to human ken, a boundary to personal efforts which, like rocks in the sea, wash but slowly away. "Canst thou by searching find out God? Canst thou find out the Almighty unto perfection? It is as high as heaven; what canst thou do? Deeper than hell; what canst thou know? The measure thereof is longer than the earth and broader than the sea."

There are few words in the English language which, in their popular and technical usage, are given a wider or more diversified application than the word law. "The law is light." "Thy law is truth." "The law made nothing perfect." "The law is not made for a righteous man."

Municipal Law.—However, we are to discuss law as instituted and enforced among men for their protection and guidance. Even in this sense law is ubiquitous. We cannot escape from its rule nor emancipate ourselves from its influence. It follows us from the cradle to the grave, to protect, admonish, restrain, compel. It anticipates nativity and guards our tongueless silence long after we have moldered into dreamless dust. The attempts to explain the rights and duties of men in society, by supposing them to have advanced from a state of nature, may be accounted for on the ground of fiction and excused on the score of entertainment, but they are barren of any practical application and entirely destitute of any useful suggestion. Society, in its origin, was not a mutual compact; but a categorical necessity. Government may be the result of mutual agreement, and constitutions always have the element of such understanding.

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[1] Wayland: Moral Science, 25.

In a state of civilization, there cannot be complete independence of the individual. His rights are necessarily limited by the rights of others. Independence means freedom of action within and under the law. Liberty is voluntary obedience to law, or in the language of the motto, "Obedience to law is liberty." Right is not inalienable but is held only upon the condition of its just and reasonable exercise; and what is just and reasonable, society, by its minister, the law, declares.

Primitive law was fragmentary and imperfect. The status of society, the moral urge of the people, must be regarded in framing or evaluating a code of laws. Upon being asked whether he had prepared the best laws for the Athenians, Solon replied: "The best they were capable of receiving." Jurisprudence does not rest on mere logic. It is necessarily based upon the actual condition of men in society and is molded by their practical relations to each other in social, economic and industrial life. A system of jurisprudence is not like a coat which may be readily put on or off; it is a habit, a character, which has become a part of the life of the people and qualifies their mode of existence. Moses presented the tablets of stone on which were engraven the Ten Commandments to a people, on whose hearts they were already engraven and in whose consciences, through generations of training, they found a ready response and approval. As the patient's condition determines the appropriate medicine to be administered and influences its effect, so the state of society affects the nature and operation of municipal law.

"**Municipal Law** *is a rule of civil conduct prescribed by the supreme power in a State, commanding what is* right *and prohibiting what is* wrong."[2] By this definition, the author must be taken to mean what the "supreme power" believes right or wrong under the circumstances, at the particular time. Cicero first announced the idea and it is repeated by Justinian. Doubtless many things that are wrong are not prohibited, and much that, at various periods, was prohibited, is not wrong.

Classes.—Municipal law is classified as

(a) Criminal Law and

(b) Civil Law

(a) **Criminal Law.**—*Criminal law deals with those offenses against the individual, or the community, which the State recognizes as wrongs to society.*

"**Crime** *is an act committed or omitted in violation of a public law either forbidding or commanding it.*"[3] A wrong which is punished by the sovereign power is a crime. Courts redress such wrongs by punishing the offender, but in criminal procedure they do not grant relief to the person who suffers from the offense. Crime and wrong are not interchangeable, because not all wrongs are crimes and the crimes of the past may become the virtues of the future.

RIGHT AND WRONG.—Every act is endowed with many qualities, according to the purpose of the classification; such as good or evil, right or wrong, legal or illegal, moral or immoral, rational or irrational. Good and evil, right and wrong are inherent elements of human actions fixed by the Creator at the foundation of the world. They are as essential to our ideas of conduct as time to our conceptions of existence or space to our understanding of matter. The common instincts of man suggest them, reason recognizes their potency in shaping men's course of action, and the experience of ages has almost crystallized them into material substance. They are controlling factors in all men's calculations and modify the course of human life. "Cast your eyes over all the nations of the world and all the history of nations," says Rousseau; "and amid so many and absurd superstitions, amid that prodigious diversity of manners and character, you will find everywhere the same principles and distinctions of moral good and evil. The paganism of the ancient world produced, indeed, abominable gods who on earth would have been shunned or punished as monsters, and who offered as a picture of supreme happiness only crimes to commit and passions to satiate. But, armed with this sacred authority, vice descended in vain from the eternal abode. She found in the heart of man a moral instinct to repel her. The continence of Xenocrates was admired by those who celebrated the debaucheries of Jupiter. The chaste Lucretia adored the unchaste Venus. The most intrepid Roman sacrificed to fear, invoked the god who dethroned his father and died without a murmur at the hand of his own. The most contemptible divinities were served by the greatest men. The holy voice of nature, stronger than that of the gods, made herself heard and respected and obeyed on earth, and seemed to banish to the confines of heaven guilt and the guilty." Moral qualities cannot be eliminated from conduct without remodeling human nature.

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[2] I Bl. 44.

[3] 4 Blackstone, 5.

Penalties.—Criminal law seeks merely the infliction of a penalty on the guilty party. The right to inflict and the purpose of the penalty will not be discussed. The tendency of enlightenment has been to lessen the number of penalties and to ameliorate their severity, and the purpose is gradually changing from vindictive to remedial,—from punishment to discipline and restraint.

Death by Accident.—Owing to the difficulty sometimes experienced in distinguishing between occurrences which happen by pure accident and those which spring from concealed design, there was a time when accident did not relieve a party from punishment for untoward results. Among the Israelites, the person who, accidentally, without apparent fault or negligence, in the reasonable prosecution of a lawful pursuit, caused the death of another, was not held entirely guiltless; for his life might lawfully be taken by the avenger of blood. Cities of refuge were appointed unto which such offenders might flee for safety nor depart thence upon pain of being slain by the prowling avenger until the death of the high priest or acquittal on trial before the whole congregation. Voluntary expatriation for a year was the Athenian penalty in such cases.

''If an ox gore a man or a woman that they die; then the ox shall be surely stoned, and his flesh shall not be eaten.'' The last clause seems to imply that the animal was *guilty of wrong,* and the procedure denotes a penalty on the owner for maintaining a vicious animal.

Only a few years ago there was abolished in England a law providing that an inanimate object which, without fault or negligence of its possessor, caused the death of a human being, should be forfeited. Similar laws prevailed in Greece, Rome and other nations of antiquity.

Penalizing Beliefs.—Nor did the criminal law confine itself to overt acts capable of demonstration, but even beliefs, especially when of a religious character, were subject to control.

Superstition rummaged heaven and hell to lay her palsied hands on offenders against prevailing beliefs. She was seized with paroxysms of hate, miscalled piety, in the presence of heretics and witches. For five hundred years, the laws from which our jurisprudence is derived were blasted by bigotry and mildewed by fanaticism. Punishments that would shock the sensibilities of cannibals were ordered in the name of the Prince of Peace and administered in the name of humanity. Intelligent conviction was *prima facie* heresy. Genius might mimic; it must not create. Mind was permitted to imitate but not to think. All the issues of life were directed into the narrow channels of the past, so that wise men were made the disciples of fools. Intelligence was hounded to the gates of the grave.

Rational investigation was the greatest crime and an original idea was banished to the regions of chaos and night. Only in hypocrisy was there safety.

(b) **Civil Law.**—*Civil law deals with disputes between individuals and usually aims at recompensing a party for the damage he has sustained by the act or default of another.* This branch of law has two divisions, (a) common law, and (b) equity. A judgment at law is usually for a specified sum of money payable to the adversary party to the suit, and in default of payment the goods of the judgment debtor may be seized and, in most states, where the action was founded upon tort, the debtor himself may be imprisoned in default of payment. The term civil law, as used in this classification, must not be confounded with the great system of jurisprudence that came down to us through the Romans and is still prevalent on the continent of Europe, and which we designate as the civil law, to distinguish it from the English system of jurisprudence which is denominated the common law.

Imprisonment for Debt.—Imprisonment for debt has been abandoned by the advancing columns of civilization. America took the lead in the humane reform among English-speaking nations. "There shall be no imprisonment for debt, except in case of fraud" is a general constitutional provision. Formerly, debtors were commonly liable to punishment, forfeiture of right or ignoble servitude. Among the Athenians, prior to the statutes of Solon, this unfortunate class were subjected to penal servitude in the interest of the creditor or exiled for life. The laws of Rome entitled the creditor to the services of the debtor during a time sufficient to satisfy his claims. They sometimes imprisoned and bound in chains the debtor's person and subjected him to whipping at the instance and discretion of the merciless creditor, and permitted himself, his wife and children to be sold into perpetual foreign slavery. Some maintain that the law of the twelve tables authorized the creditors to cut the debtor's body into pieces and take their proportional parts determined by their respective claims. Blackstone tells us that, among certain people of India, the creditor might violate with impunity the chastity of his debtor's wife in satisfaction of his claim. Legislators, prompted by the cupidity and malice of creditors, exhausted ingenuity in devising methods of persecution and means of extortion. Bankrupts in England were treated as criminals by early statutes. The merchant who, hoping to retrieve his losses by a propitious turn of fortune, concealed his insolvency, was pursued by the sleuth-hounds of malice until the tomb, more charitable than man, opened to receive him. Taking a reasonable risk in commercial industry was facing the debtor's prison and the felon's disgrace.

Criminal Action and Civil Suit.—A criminal action and a civil suit at law may grow out of the same facts; thus, if A assaults and beats B he will be liable in a criminal action for assault and battery, at the suit of the State, and if found guilty he may be fined or imprisoned, or both, and he will also be liable in a civil suit at law for damages to B, and if found guilty a money judgment will be entered against him which, if not paid, is, in most states, a basis for a capias on which he may be imprisoned. A thief may be proceeded against criminally by the State, and also civilly by the owner of the property converted to recover the value thereof.

Substantive Law.—Substantive law is based upon the prevailing notions of right and wrong and develops with the evolution of our ideas of justice. *It is the expression of permanent, prevalent, persistent public opinion,* fortified by the composite conscience of the race, hence the similarity in laws of all civilized peoples.

Administrative Law.—*Administrative law is a method provided for aiding and protecting defined legal rights; the law which prescribes the method of enforcing rights or obtaining redress for their invasion.* Administrative law grows out of custom. What at one time was practice, developed into custom and finally crystallized into law.

Development of Medical Science.—The study of human ailments has always challenged the attention and absorbed the best thought of mankind. Because of the early association of disease with the idea of punishment for offenses against the deities it is not surprising that in the earlier ages the treatment of maladies should have taken on a religious aspect. As disease was supposed to be a punishment by the gods for the sins of those who were afflicted, the rational course of treatment was to appease the wrath of the offended deities by appropriate expiatory incantations. This notion is still entertained in modified forms, and the old treatments, also modified, are still believed by some to be efficacious. But it was early discovered that this hypothesis of the origin of disease did not harmonize with all cases; that afflictions were visited alike on the just and the unjust, and, therefore, a belief arose that human ailments were the manifestations of the possession of the afflicted by evil spirits. In fact it was believed that man and the world he lives in were the field of contest between the evil and the good. Then, to be ill was to be possessed of malignant and wicked spirits. In such frame of mind the rational treatment for sickness would naturally consist in the unrelenting exorcism of these demons of hate. Often the remedy was worse than the disease, but if the patient recovered he sang the praises of his deliverers; if he died—well—he was gathered to his fathers.

During these stages of the healing art, but little attention was paid to the study of the real causes of disease and the means of its amelioration. But gradually enlightenment dawns on a prejudiced and biased world and one by one, by slow degrees, by more and more, the eternal verities are revealed. Some one had the temerity to think that somehow the human organism itself might have something to do with the subject of sickness, and the study of anatomy began. It finally dawned upon the more intelligent that possibly the various organs, parts and tissues of the body had some function, some purpose in the economy of life, and the beginning of physiology dawned.

For the purposes of this volume it is unnecessary to trace minutely the development of the science of medicine and surgery and its allied fields of investigation. Suffice it to say that medical knowledge kept pace with the development of other inductive sciences and, as law is the interpretation and expression of the enlightenment of the era, the medical fraternity has, step by step, shaped our jurisprudence in matters pertaining to medical subjects. Whatever the state of knowledge at the time, that was the condition which prevailed and was enforced in the courts. The latter turned to the medical profession for instruction and guidance on medical subjects and, of course, accepted the prevailing sentiments on the subjects involved. As late as the latter half of the 17th century the courts accepted the opinions of doctors and learned men that persons on trial were bewitched. All the vagaries of the profession have at one time or another prevailed in the administration of the law. In all ages the medical profession was looked to for the last word on what was right and what was wrong within its domain.

The Physician and the Courts.—Courts have always tried to enforce the laws in the spirit of the enlightenment of the time and have never hesitated to impress the services of men of science and skill to enable them to arrive at a correct conclusion on the issues presented for consideration. They never lead but should keep pace with public opinion. Where the science of medicine is involved, the physician is appealed to for information, in the administration of the law and the settlement of matters in dispute. The scenes enacted in courts are always intensely human.

Scope of Subject.—Questions with a medical significance are always being pressed for answer and the ingenuity of the specialist is taxed to keep pace with the exacting demands of the issues raised. The distinctly medical subjects involved are not only intricate and diversified but also incapable of exact classification, while the legal aspect thereof includes both substantive and administrative law. Some of the earliest questions raised were the legitimacy of claimants to inheritances and put in issue matters of impotency, sterility, period of gestation in women and other sexual subjects, and the courts sought the assistance of medical men to settle the issues. The tremendous development of industry and transportation has its corresponding concomitant in injuries to the person, and its inevitable attendant, death by violence through negligence and accident, and as a result our courts are flooded with litigation between the injured and those alleged to be legally responsible for the misfortune, and in turn this fact has given a like prominence to the medical significance of personal injuries, their causes, cures and effects. Every branch of medical knowledge, in one form or another, may be needed to settle disputes between litigants.

Medical Jurisprudence.—*Medical Jurisprudence is the science which treats of the application of medical and surgical knowledge and skill to the principles and administration of the law. It comprises all legal subjects which have a medical aspect, and all medical subjects which have a legal aspect.*

Other Definitions.—*Medical Jurisprudence* is the application of medical science and art to the elucidation of legal questions which have a medical aspect.

Medical Jurisprudence is that science which applies the principles and practice of medicine and surgery to the elucidation and settlement of doubtful questions which arise in courts in the administration of the law.

The author has confined himself to the legal phase of the subject and the reader is referred to standard medical works for the medical side.

CHAPTER II

COURTS AND PROCEDURE

Courts.—Every civilized community establishes tribunals charged with the duty of doing justice between disputants, of interpreting laws and settling legal disputes between its members and places at their disposal the supreme power in the State, to enforce their judgments and commands.

A Court is a judicial tribunal constituted by the supreme power of a State to interpret and apply its laws and to enforce certain rights and redress certain wrongs in accordance with established usage or prescribed rules of procedure.

Legal Right.—*A Legal Right is a claim enforcible in a judicial tribunal;* a capacity residing in one person to control or restrain, with the assent and assistance of the State, the actions of another. With reference to their application and origin, legal rights in common law are divided into two classes, (a) rights *in personam* and (b) rights *in rem.* The former are exercisable over persons, the latter over things. Rights, in the civil law, have been classified as (a) rights in law, enforcible in the courts; (b) rights in trust, enforcible in conscience, that is to say, in equity, and (c) rights in courtesy, enforcible only by persuasion, entreaty, etc.

Jurisdiction.—*Jurisdiction is the legal power to hear and determine.* In this connection, two things must be considered, (a) the subject-matter of the controversy, and (b) the person of the litigants. Jurisdiction of the subject-matter is derived expressly or impliedly from the authority which creates the court, while jurisdiction of the person is acquired by notice in accordance with the provisions of law or established usage.

Notice.—Some form of notice to the party whose rights are to be affected is indispensable to the right of the court to proceed against him; in fact such course is inherent in human ideas of justice. The notice given a party in a civil suit is known as a summons, and must be served in time to give him a reasonable opportunity to be heard. Granting (a) that the court has jurisdiction over the subject-matter of the controversy, then (b) jurisdiction of the person attaches with service of the summons.

When a court has a right to try and to determine a cause, it is said to have jurisdiction thereof, and its orders and judgments are binding upon all parties to the suit and their privies, and even upon the court itself in all subsequent litigation involving the same points and parties. However, if a court does not have jurisdiction its decrees are in absolute nullity and are binding upon no one. In civil matters the actual presence of the defendant is not essential to the power of the court to proceed, when it appears that the defendant has been given due notice according to law. Under certain circumstances, courts may proceed against property within their territorial jurisdiction, even though they cannot reach the owner personally by their processes. The property which is protected by the law of a state must be subject to its laws for the enforcement of rights with reference to the property itself and also with reference to claims against its owner. In this connection jurisdiction may be (a) *in rem,* or (b) *in personam.*

Procedure.—Court procedure is a development from custom, while customs have their origin in the habits, mode of life and special circumstances of the people among whom they prevail. *The chief merit of any system of procedure lies in* (a) *the generality of its application,* (b) *the uniformity of its rules and* (c) *the certainty of its course. Courts must adhere to established modes of procedure,* otherwise the administration of justice would fall into chaos. There is great diversity in the procedure of the courts of different countries and yet in the end all arrive at substantial justice. In some systems of jurisprudence the lawyer has but little influence on the course of inquiry, while on the other hand wherever English jurisprudence prevails, the interrogating lawyer can determine in a large measure the course of the testimony. The witness may be confined to a categorical answer to a specific, limited question propounded to him. He may even be required to answer a specific question by either "yes" or "no," according to the circumstances, and if he says he cannot so answer, his testimony thereon in that examination may be limited to that admission. The object of rules of procedure, relating to the introduction of evidence, is to enable the court to control the character of evidence introduced and confine it to the point at issue. All answers to direct interrogatories must be responsive to their respective questions, and confined to the purview of the questions to which they respond. Any answer or part of answer which does not meet these requirements, either by not being responsive or by volunteering more than the question called for, will be stricken from the record, on motion. This is in sharp contrast to some systems of jurisprudence. In certain actions in some jurisdictions it appears that the witnesses are permitted to harangue the court and jury without any power or right on the part of counsel to interfere with their tirade. They may comment upon the effect of testimony, may boast of the prominence of themselves, the superiority of their intellect and experience, the importance of their statements and conclusions, may give their opinion on the guilt of the accused, may berate the defendant from the witness chair, and even refer to matters of hearsay several persons removed.

Processes.—There are a few processes of court everybody should understand; such as *summons, subpœna, execution.*

Summons is a writ commanding the sheriff or other officer to notify a defendant to a suit to appear in court on a certain day to answer a complaint made against him.

If the summons is properly served, as shown by the return thereon by the proper officer, the court acquires jurisdiction of said defendant, and will proceed whether he appears or not. If the party sued desires to defend, he must appear.

Subpœna is the process by which the attendance of a witness is required; a writ directed to a person, and, under a penalty therein mentioned, requiring his attendance at a particular time and place to testify as a witness.

A subpœna properly served must be obeyed. Courts must have power to compel witnesses to appear and testify; otherwise, we might as well abandon our judicial tribunals.

An Execution is the writ by which the judgment of a court is enforced; a writ issuing from the court in which judgment was rendered, directed to an officer thereof and running against the body or goods of the judgment debtor, by which the judgment of the court is enforced.

Trial.—*A Trial is a regular and formal examination by a competent court or judicial officer into the material facts of a controversy in issue, in order to determine and enforce the respective rights of the contestants.* Some trials may be conducted by the judge alone, and others with the assistance of a jury.

Jury.—Since the time when his rebellious subjects wrung *Magna Charta* from the reluctant hands of King John, June 15, 1215, it has been a cardinal principle of civil liberty among English speaking people that no person may be seized or imprisoned or disseized of his free-hold or estate; or exiled or condemned or deprived of life, liberty or property except by the law of the land or the judgment of his peers. "No freeman," runs that great proclamation of the rights of the common people, "shall be seized or imprisoned, or dispossessed or outlawed, or in any way brought to ruin; we will not go against any man nor send against him, save by legal judgment of his peers or by the law of the land."

A Jury is a number of qualified persons selected in the *manner prescribed by law, impaneled and sworn to inquire into and try any matter of fact in issue and to declare the truth on the evidence given them in the case.* By the Federal Constitution a party charged with crime has a right to a trial by a jury, which shall determine all controverted questions of fact. In all criminal prosecutions, and in civil suits in Illinois, where the value in controversy exceeds twenty dollars, *questions of fact* are to be decided by jury. All states have similar provisions, constitutional or statutory. In courts of equity the trial is had before the chancellor. However, he may call a jury to pass upon issues of fact, but the finding of the jury is usually only advisory and not binding upon him.

Trial by Ordeal.—Sometimes the accused was given the right of trial by ordeal. According to the beliefs of the time, an innocent person accused of crime could walk, hoodwinked, unharmed over red-hot irons placed on the ground at irregular intervals; could drink with impunity the most deadly poisons; could put his hands in boiling water or hold a hot iron without injury, and would not sink if thrown into water.

Constitutional Guarantees.—Formerly, but few trial privileges were given to persons accused of crime. They were not permitted to have counsel and often were practically debarred the right to make a defense. Presumption of guilt and burden of proof were against them. The trial was purely an *ex parte* proceeding and in many cases all that remained to be done after the indictment was found was to inflict the penalty. The accused might not see or know who were the witnesses against him or even know the nature of their testimony, and was not permitted compulsory process to procure the attendance of witnesses in his behalf. Such procedure often led to great injustice and was subject to intolerable abuse by persons of influence and authority, in the country from which our jurisprudence is derived. Owing to this historical experience, these subjects are now controlled by constitutional provisions in this country. The Federal Constitution provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."[1]

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[1] Const. U. S., Amdmt. 6.

CHAPTER III

EVIDENCE

Generically.—Evidence is a general term and means that which demonstrates or tends to establish or make clear or certain the truth or falsity of a fact in issue. *In law, evidence is any matter of fact or opinion, the effect, tendency or design of which is to produce in the mind a persuasion, or inclination, affirmative or negative, of the existence of some other matter of fact which is the subject of inquiry and includes all the means, whether of fact or opinion, by which an alleged fact, the truth of which is submitted for investigation, is established or disproved.*

Testimony.—*Testimony is the statement or declaration of a witness before a court for the purpose of establishing or refuting some fact in issue.* It is a branch of evidence and is the means by which certain facts, within the knowledge of persons, are brought before the court when the same are material to the issues in the case.

Witness.—*A Witness is one who gives testimony in a case before a court,* and includes every person from whom testimony is received to be used in a judicial proceeding.[1]

Oath or Affirmation.—Before testifying a *witness must be sworn or affirmed to tell the truth.*

Competency.—The question of *the competency of evidence is addressed to the court but its weight and effect are exclusively for the jury.* The competency of witnesses has been greatly extended in modern times by legislation. The tendency of courts, in their application of the rules of evidence, has been in the same direction of liberality. More and more has been left to be determined upon the credibility of the witness, but there has not been any relaxation of the rule against hearsay evidence, nor has the scope allotted to the field of opinion evidence been materially enlarged. Hearsay evidence has always been regarded as generally untrustworthy, while opinion evidence is placed low in the scale and receivable at all only because there seems no other practicable way to establish the fact.[2]

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[1] **Baker *v.* Coit, 1 Root, 225; Bliss *v.* Scheman, 47 Me., 252.**

Character of Testimony.—As to its character testimony is (a) statements of facts or (b) expressions of opinions.

(a) **Statements of Facts.**—Generally speaking, a witness may testify only to facts, circumstances and conditions which have been brought to his knowledge by means of one or more of his senses, but he may not state inferences or conclusions drawn by him from such observations or from admitted facts.

(b) **Expressions of Opinions.**—*Opinion Evidence is testimony in the form of an opinion or conclusion, relevant to the issues in the case.* Testimony in the form of an opinion may be given by (1) ordinary witnesses or (2) expert witnesses.

(1) OPINION BY ORDINARY WITNESSES.—In actual practice, there are a great variety of subjects in which the testimony of ordinary witnesses savors of opinion evidence.[3] Thus, an ordinary witness may state an opinion concerning the age of a person whom he has seen; on matters of color, size, weight, quantity, value, distance, speed, time, etc.; relative to the identity of persons, places or things; whether a person appeared angry, sad, nervous, excited, sick, in poor health, well, ill attached to another, sober or intoxicated;[4] whether a person appeared to be suffering pain, showed fear, manifested grief, was formerly in good health, was rational or irrational, sane or insane, had failed mentally in a given time, looked bad, was of intemperate habits, acted strangely or in a childish manner, was "short" in answer-

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[2] C. & O. Ry. Co. *v.* Wiley, 134 Ky., 461.

[3] Hopt. *v.* Utah, 120 U. S., 437.

[4] Whittier *v.* Franklin, 46 N. H., 23; Knoll *v.* State, 55 Wis., 249.

ing questions, eccentric, or of a fickle mind; was *angry,* or *excited,* or *intoxicated,* or *sad,* etc.; the state of health, hearing or eye-sight of another, or the ability of another to work, or walk, or use his arms or legs naturally, or whether such other person is apparently suffering pain, or was unconscious, or in possession of his or her mental faculties, intoxicated, excited, calm, etc.; whether the mind of a person was clear, etc.[5]

Not Favored.—The law does not look with favor upon the introduction of opinion evidence. As a rule, witnesses are required to testify to facts directly within their knowledge; it is for the court or jury to draw conclusions and form opinions of ultimate facts from the probative facts thus brought before them.

(2) EXPERT WITNESSES.—*Expert Opinion Evidence is testimony in the form of an opinion based upon facts proved, known, admitted, or assumed, concerning a matter involving scientific or technical knowledge of an art or science, not within the experience of the ordinary witness.*

Where a previous habit of study is essential to the formation of an opinion sought to be put in evidence, only such persons are competent to express an opinion as have, by experience, special learning or training, gained a knowledge of the subject-matter upon which an opinion is to be given, superior to that of an ordinary person.

Subject-Matter of Expert Testimony.—The test of the admissibility of expert testimony is,—*Is the subject upon which the evidence is offered, one of science, skill or special experience or occupation?* The subject must be one which, as a matter of judicial notice, the courts recognize as being a sphere or department of special study, experience or occupation, either for professional or other purposes, and it must relate to some particular department of human knowledge or activity. The subjects to which this kind of evidence is applicable are not necessarily confined to classified and specific professions. It is applicable wherever particular skill, experience and judgment, applied to particular subjects, are required to explain results or trace them to their causes, and in which, as a matter of business, recreation or study, there are persons who are specially informed.[6]

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[5] Com. *v.* Sturtevant, 117 Mass., 122.

However, the alleged detection of deception and falsehood by systolic blood-pressure based on the theory that truth is spontaneous and comes without conscious effort or interruption of circulations, while the practice of deception and the utterance of falsehood require a conscious effort which is directly reflected in the blood-pressure, was held not to have such a scientific recognition among psychologists and physiologists, based upon experiments and deductions thus far made, as would justify the courts in admitting expert testimony on the results of such experiments on the defendant. While the courts will go a long way in admitting expert testimony, deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general recognition and acceptance in the particular field in which it belongs.[7]

Effect of Opinion Evidence.—The jury cannot disregard the testimony of medical experts where it refers to facts directly pertaining to the profession, but when it comes to the mere opinion of witnesses, however skillful, as in cases of insanity, the jury have a right to disregard the opinions and substitute their own conclusions from their ordinary intelligence and information. Generally opinion evidence is only advisory. It may be followed or disregarded by the jury. Experts are permitted to testify with a view of assisting the jury to draw the right conclusions but they do not take the place of the jury. After all the experts have spoken, the jury must draw its own conclusions of legal responsibility.[8] However, the jury are necessarily bound, independent of every other consideration, to adopt the testimony of physicians and surgeons when they come to determine whether, on the facts in the case, the defendants treated the patient in proper form and by the use of proper appliances.[9] Also, while the opinion of experts as to the customary charge for services, the reasonableness of a given fee or the value of certain professional services are not considered binding on court or jury, they may not be arbitrarily disregarded without reason appearing in the evidence.[10]

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[6] W. C. S. R. Co. *v.* Fishman, 169 Ill., 196, 198; Greinke *v.* Chicago City Ry. Co., 234 Ill., 564, 571.

[7] Frye *v.* United States, 293 Fed., 1013 (1923).

Weight.—The opinion of a physician is entitled to such weight and consideration as his experience, skill and knowledge, in the special subject of inquiry justify.[11] It is the duty of the jury to consider, as affecting credibility, that a physician who testified as an expert was specially compensated by the party in whose favor he testified.[12] At the present time, the force of expert testimony is greatly weakened by a prevailing conviction that the expert is a special pleader who presents at best only one side of the case and whose opinion is regulated according to the size and source of his fee.

The jury are the judges of the weight to be given to the testimony of experts and generally speaking their finding in that respect is final and binding on the court and the parties. Thus, to sustain a verdict for the patient in an action against a doctor for malpractice, it is not necessary that all expert witnesses called should consider the treatment pursued by the physician improper; nor will the fact that all expert witnesses agreed that a portion of such treatment was proper, under some circumstances, in itself defeat the verdict and require a new trial.[13]

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[8] Rolater *v.* Strain (Okla.), 137 Pac., 96, 99; Oborn *v.* State, 143 Wis., 249.

[9] Spaulding *v.* Bliss, 83 Mich., 311.

[10] Spaulding *v.* Bliss, 83 Mich., 311; Ladd *v.* Witte, 116 Wis., 35; *In re* Smith, 41 N. Y. Supp., 1093.

[11] U. S. *v.* Prendergast, 32 Fed., 198.

[12] Ware *v.* Starkey, 80 Va., 204; Harvey *v.* Packet Co., 8 Miss., 99.

[13] Stohlman *v.* Davis (Neb.), 220 N.W. 247; 60 ALR 664.

CHAPTER IV

RULES OF EVIDENCE

Definition.—RULES OF EVIDENCE are regulations adopted by the courts to control the course of trials and determine the character and order of proof by which the facts in issue are to be established or refuted. They are indispensable to orderly and uniform administration of justice.

Basic Principles.—A practical knowledge of the character of evidence which is admissible in court and the methods of its introduction is practically indispensable to efficient testimony as an expert and is highly desirable even when testifying as an ordinary witness. A few of the more important rules are:

(1) Ordinarily a witness must confine himself to a statement of facts which have come to his knowledge through one or more of his senses.

(2) Except in special cases, he may not testify to what others told him, or to matters of mere rumor.

(3) Usually he may not express an opinion or mental conclusion from the facts testified to by him nor on any matter in issue nor on any collateral fact.

(4) His answer must be responsive to the question.

(5) His answer should not go beyond the purview of the question.

(6) Ordinarily he should not volunteer information.

(7) A witness who speaks English must testify in that language.

Hearsay.—*Hearsay Testimony is statements of a witness of what others had told him, or what he had heard said by others.* Hearsay is the term applied to that species of testimony given by a witness who undertakes to relate, not what he knows personally, but what others have told him, or what he has heard said by others.

Under the rules of evidence in our jurisprudence, hearsay testimony is excluded. It comes clothed in too much uncertainty to give it any probative force, and except in rare cases it is not admissible for any purpose. This rule of law is based upon our habit of reasoning and, therefore, the law indulges no presumption or inference of the truth of an issue merely because a witness states that some one, not before the court, asserted its existence mediately or immediately to the witness. It is the policy of the law to exclude from the evidence the statements of a party who is not before the court to be put under oath, cross-examined, and the source and credibility of his information inquired into.[1]

Statements Against Interest.—What a party to a suit says against his own interests in matters then or later in litigation is not hearsay, and may be introduced in evidence through those who heard him.

It is a rule of common law, in criminal cases, to which there are but few exceptions, that *witnesses must* (a) *be produced in open court,* (b) *confront the defendant, and* (c) *give their testimony under oath or on affirmation.*

Dying Declarations.—*A Dying Declaration is a statement of material facts concerning the cause and circumstances of a homicide, made by the victim under a solemn conviction of impending death.*

It will be observed that the admission of dying declaration violates the rules above mentioned; the declarant is not in court or under oath and, usually, the statement is not made in the presence of the accused.

REASONS FOR THE EXCEPTION.—This well recognized exception to the rule excluding hearsay evidence is made (a) because of the necessity of the situation and (b) because of the strong probability that, under the circumstances, the declaration is true. The Supreme Court of Illinois gives a concise and able statement of the reason of the rule, as follows:

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[1] Grubey *v.* National Bank, 133 Ill., 79; Kent *v.* Mason, 79 Ill., 540.

"The statements of the deceased as to the cause of the injury from which death finally results, when dying declarations within the meaning of the law, are admitted in evidence on the ground of necessity, and the rule under which they are admitted forms an exception in the law of evidence. The accused, under the rule, has not the benefit of 'meeting the witnesses aganist him face to face'; a constititional right in all criminal trials, with this solitary exception. He is deprived of the security of an oath, attended with consequences of temporal punishment for perjury. He is deprived of the great safeguard against misrepresentation and misapprehension,—the power of cross-examination. The evidence is hearsay in its character; the statements are liable to be misunderstood and to be misrepeated upon the trial, and the evidence goes to the jury with surroundings tending to produce upon the mind emotions of deep sympathy for the deceased and of involuntary resentment against the accused. It is vain to attempt to disguise the infirmities and imperfections of the human mind and its susceptibilities to false impressions under circumstances touching the heart and exciting the sympathies, and the law has wisely, in case of dying declarations, required all the guaranties of truth the nature of the case admits of. The principle upon which such declarations are admitted is, that they are made in a condition so solemn and awful as to exclude the supposition that the party making them could have been influenced by malice, revenge or any conceivable motive to misrepresent, and when every inducement, emotion and motive is to speak the truth. In other words, in view of impending death, and under the sanctions of a moral sense of certain and just retribution. *A dying declaration, therefore, is a statement made by a party, relating to the cause of the injury of which he afterwards dies, under the fixed belief and moral conviction that his* *death is impending and certain to follow almost immediately, without opportunity for repentance, and in the absense of all hope of avoidance when he has despaired of life, and looks to death as inevitable and at hand.''*[2] . . . .

Conditions of Admissibility:

1. The statement must be made in the immediate prospect of death, and death must be imminent both as a matter of *fact* and of declarant's *impressions.*

2. The cause of death must be the subject of judicial inquiry; it cannot be used on a trial for robbery,[3] nor for perjury,[4] nor for abortion,[5] nor for rape.[6]

3. The declaration must refer to the circumstances of the injury.

4. Death must have resulted without delay from the injury.

5. The declarant must have been competent to testify to the facts in the statement, if he were living.

6. The statement is admissible only to the extent the declarant if living could have testified.

7. The declaration must have been complete in itself.

8. The declarant must have been rational at the time of making the statement.

9. The declaration may have been by signs, in response to questions, or otherwise.

10. The *competency* of such statements is a matter to be first determined by the court, but when once admitted the *weight* of the same is for the jury.

11. If the statement is in writing the instrument should be produced, if possible; if the statement was oral, witnesses may repeat the same, though they are able to give only the substance.

Medical men are occasionally in positions where statements of this character are made to them. The entire statement of the deceased, and what was said to him or in his presence at the time should be reduced to writing without delay in order to preserve the statement for court, should the matter at any time become the subject of judicial inquiry.

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[2] Starkey *v.* People, 17 Ill., 17, 20.
[3] Rex *v.* Lloyd, 4 C. & P., 233.
[4] Rex *v.* Mead, 2 B. & C., 605.
[5] Rex *v.* Hutchinson, 2 B. & C., 608—note.
[6] Johnson *v.* State, 50 Ala., 456.

Physicians are sometimes called to attend women who are suffering from the results of criminal abortions. In such a case the patient may disclose to the physician the circumstances of the operation. When made for the purpose of treatment, while the patient has hopes of recovery, such statements do not amount to dying declarations and the physician, after the death of his patient, as the result of the illegal act, will not be permitted to repeat them from the witness stand in the prosecution for murder of the person supposed to have performed the operation. In these cases, the medical profession owes it to the public to secure, wherever possible, statements from such patients after they are thoroughly impressed with the idea that they cannot live and that death is certain and at hand, as to the nature and circumstances of the operation, and the names of the parties who were active in the performance thereof. Often a dying declaration is the only direct evidence of the relation of the defendant to the crime. Of course, the physician should first satisfy himself of the good faith of the patient and that she is not actuated by malice or any ulterior motives. The statement should be sufficiently explicit to connect the supposed offender with the *intent* to produce an abortion. The mere statement that the defendant treated her, or even that he used instruments on her, unless corroborated by other incriminating evidence, would not be sufficient to sustain a conviction. What the defendant did may have been for the purpose of relieving a condition inevitably tending to produce a miscarriage. Granting that the crime exists, the statement should disclose facts and circumstances inconsistent with the innocence of the accused, and should characterize his conduct as criminal and improper on any hypothesis of good faith. When called on a case where abortion or attempted abortion is suspected, a physician should immediately take every available precaution which will have a tendency to show that he was not the party responsible for the unnatural condition. A very good course is to call in another physician in consultation and together get as much of the history of the case as the patient can be induced to disclose. Of course the physician can always refuse to take the case, but even then the circumstances of his visit or of the would-be patient's call may be such as to cast suspicion on him or give excuse for the tongue of gossip to wag and, therefore, wherever possible, this result should be guarded against at the time.

Res Gestæ.—Spontaneous exclamations and statements made at the time of the occurrence of an event which afterwards becomes the subject of judicial inquiry, are called *res gestæ* and are admissible in evidence as being a *part of the incident* under consideration. These statements cover a much broader field than dying declarations. Some courts have admitted statements made to physicians, including exclamations of pain and suffering, by patients in the course of professional examination on the ground that they were a part of the *res gestæ,* in cases where the physical condition of the patient was the subject of inquiry. When an expert is called upon to give his opinion as to the cause of his patient's condition at a particular time, he may state what his patient said to him in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation and *which give it the character of res gestæ.*[7]

Statements by Patient to Physician.—Statements by a patient to his physician are divided into two classes, (a) those made during the progress of diagnosis to enable the physician properly to treat the patient and (b) those made to assist the physician in diagnosing his case for purposes of testimony in court or other purposes not related to the treatment of the patient. It has been held that the statements of the patient to his physician relative to his condition and the cause and circumstances thereof, made in good faith, for the purposes of professional treatment of such condition, are not strictly hearsay if they should later become relevant to an issue in a suit in court. Even though such statements are favorable to the contention of the patient in a suit to which he is a party, it has been considered that the practitioner may testify thereto by repeating them from the witness stand.[8]

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[7] I. C. R. R. Co. *v.* Sutton, 42 Ill., 438, 441.

Relative to this general subject Chief Justice Bigelow said that the admissibility of such statements, when made for the purpose of receiving medical advice, "is an exception to the general rule of evidence, which has its origin in the necessity of the case. To the argument against their competency founded on the danger of deception and fraud, the answer is that such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the condition and appearance of the person making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth."[9]

PAIN AND SUFFERING.—Some courts limit such statement to questions of pain and suffering. In Illinois, it has been held that declarations made by an injured party to his attending physician are admissible in evidence when they relate to the part of his body injured, his sufferings, symptoms and the like, but not if they relate to the cause of his injury.[10]

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[8] Shearer *v.* Buckley, 31 Wash., 370; 72 Pac., 76.
[9] Barber *v.* Merriam, 11 Allen, 322.

Such statements are admissible, (a) when made to a physician during treatment or upon an examination, not for purpose of testifying in litigation then pending, (b) when they refer to pains immediately connected with the injury, and (c) when they are in the nature of *res gestæ*.[11]

When not made for professional treatment, as when made during an examination of the patient with a view of qualifying the physician to testify in a pending suit, statements of pain and suffering to a physician by his patient are not admissible.[12]

A physician, when asked to give his opinion as to the cause of the patient's condition at a particular time, must, in forming his opinion, necessarily be guided to some extent by what the sick person told him in detailing his pains and sufferings. This is inevitable, and the opinion of the expert, founded in part upon such data, is receivable in evidence, and he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and which give it the character of *res gestæ*.[13]

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[10] Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill., 625.
[11] W. C. S. R. Co., *v.* Carr, 170 Ill., 478.
[12] R. Co. *v.* Carr, 170 Ill., 478, 483.
[13] I. C. R. R. Co. *v.* Sutton, 42 Ill., 438, 441.

CHAPTER V

RULES OF EVIDENCE

Privileged Communications.—Confidential communications between attorney and client, priest and penitent, physician and patient and husband and wife, sometimes relate to matters which then are, or subsequently become, the subject of judicial inquiry. When, by law, these communications are excluded from disclosure in evidence they are termed *privileged communications.* When the disclosure of such communications is forbidden by the law, it is upon grounds of public policy on the presumption that "greater mischief would probably result from requiring or permitting their admission than from wholly rejecting them."[1]

At Common Law.—Under the common law this privilege extended only to attorney and client.

Statutes.—The exemption has been enlarged by statutes in many states and countries to include communications between physician and patient, priest and penitent and husband and wife.

Provisions.—The statutes referring to physicians usually designate the parties, disclosures to whom shall be privileged, as "physicians and surgeons in the practice of their profession," those "practicing physic and surgery," or other similar expressions. The student is referred to the statutes in which he is interested for their special provisions.

Purposes.—The purpose of these statutes is to throw around such disclosures as the patient is required to make for the necessary information of his attending physician the cloak of secrecy; the prime object being to invite confidence in respect to ailments and the causes thereof, in order that the patient may get the fullest measure of benefit from the professional services. Where the relation is such that no public necessity or propriety exists for encouraging the reposing of confidence the reason for the privilege fails and the law does not apply. If there is no justification for disclosing secret maladies and their history and causes, there is no confidence to be abused and there is no privilege.

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[1] Greenleaf on Evidence, Sec. 236.

INTERPRETATION.—In spirit, such statutes do not usually include cases where the malady is apparent to every one on inspection, but in their application they are generally construed to apply to all information necessarily disclosed or discovered upon any investigation which was necessary to the proper treatment of the patient. They protect with the mantle of privilege whatever, in order to enable the physician properly to prescribe, was disclosed to any of his senses and which was in any way brought to his knowledge for that purpose; that is to say, any information which was necessary to enable the physician to prescribe for the patient as a physician, or to perform any surgical operation for him as a surgeon, is privileged.[2] Under such statutes any information disclosed to a physician by a patient to enable him properly to prescribe for the patient, or discoveries made by the physician in the course of his examination therefor, cannot be revealed on the witness stand by the physician, and the privilege usually extends to persons present during the interview.[3] Where no proof appears to the contrary, the court will presume that the communication of a physical condition and of all matters pertaining thereto, was necessary to enable the physician properly to treat the patient. Since the examination is with the consent of the patient, any knowledge obtained thereby is construed to be a communication.[4]

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[2] Campau *v.* North, 39 Mich., 606, 609; Dittrich *v.* Detroit, 98 Mich., 245.

[3] Campau *v.* North, 39 Mich., 606; Edington *v.* Insurance Co., 67 N. Y., 185.

[4] Williams *v.* Johnson, 112 Ind., 273; Prader *v.* Acc. Assn., 95 Ia., 149; Ausdenmoore *v.* Holzback (Ohio), 106 N. E., 41.

Incidental Information.—Knowledge which was not acquired for the purpose of treatment, but is obtained incidentally without special reference to the relation, is not usually exempt from disclosure. Thus, a physician is called to treat a party soon after an injury, and by his own observation or the admission of the patient, discovers that the patient is under the influence of liquor, it has been held that the knowledge of such fact is not protected from disclosure because the disclosure was not necessary to the proper treatment of the injury and the physician was not required to make an investigation as to intoxication in order properly to diagnose the trouble and dress the wound. Such discovery or disclosure is a mere incident to the treatment.[5] Where the disclosure is purely voluntary and manifestly not necessary for the purpose of the employment, the privilege will not apply. Thus, where a woman about to be delivered of a bastard child, said to her physician: "The father of my child never promised to marry me," the statement was held not to come within the privilege.

Patient Need Not be Party to Suit.—The purpose of the privilege does not relate to the nature or circumstances of the litigation and therefore the privilege prevails whether the patient is or is not a party to the suit.

Statement by Physician to Patient.—A statement of fact or opinion by a physician to his patient in the course of professional treatment based upon a narration of facts by the patient for the purpose of treatment, or upon a physical examination of the patient by the physician for that purpose is privileged. If the physician were permitted to disclose what he told the patient as to the character of his ailment, the protection contemplated by the statute would often be defeated, for, otherwise, by indirection, a disclosure of the nature of the disease could readily be effected. For the same reason the privilege attaches to statements by one physician to another in the presence of the patient during a consultation.

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[5] Note to Dittrich *v.* Detroit, 98 Mich., 245.

Waiver of Privilege.—The courts usually construe these privileges as being for the benefit of the patient and that the patient can waive the privilege if he desires; but unless he waives it, the lips of the physician are forever sealed,—"the seal of the law once fixed upon them, remains forever, unless removed by the party himself in whose favor it was there placed." The fact that the patient and other witnesses produced by him have testified fully as to his physical condition at the time of the examination by the physician is not a waiver of the privilege.[6] In some jurisdictions the courts hold that, as it is a personal privilege, it must be claimed by the patient, otherwise the courts will enforce disclosure thereof.[7]

Where the patient sues the physician for malpractice or defends a suit by the physician for his fee, on the ground of malpractice, the rule of privilege does not lie as to all matters connected with the treatment or operation in reference to which malpractice is alleged, because by raising the issue of improper treatment or operation, he is conclusively presumed to waive the privilege. The patient will not be permitted to raise an issue and at the same time bar the physician's defense thereto. But where the defense to a suit by a physician for his services is the general issue, that is, a general denial of the services and of their value, the character and propriety of the treatment are not in issue and the privilege will apply.

Privilege is an Entirety.—The privilege is an entirety and a waiver of the benefit of a protecting statute is a waiver of the disqualification of the physician as to the entire course of treatment or transaction.[8]

Autopsy.—Where the attending physician performs an autopsy on his late patient, at the instance of the defendant charged with negligence causing the death, and over the objection of the plaintiff in the case, he will not be permitted to disclose on the trial, either the results of the autopsy, or his conclusions thereform, as to the cause of death.[9] As to the opinion, at least, it would necessarily be founded in part upon information disclosed by the relation of physician and patient during the life of the latter and, therefore, should be privileged from disclosure.

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[6] Arizona & N. M. Ry. Co. *v.* Clark, 235, U. S. 669; L. R. A. 1915 C, 834.

[7] Railroad Co. *v.* Martin, 41 Mich., 667.

[8] Bryant *v.* M. W. A., 86 Neb., 372, 378.

Where the autopsy was held by a physician who had not attended the deceased during his lifetime and where the cause of death was the subject of inquiry, the physician was permitted to testify to the results of the autoptical examination and to give his opinion as to the cause of death.[10] This decision is based, in part, upon the wording of the statute but, apparently, the ruling would have been the same had the deceased in his lifetime been the patient of the physician at the time covered by the inquiry.

Duty of the Physician.—When called upon to make a disclosure which may be in violation of the confidence of his patient, the physician should claim the privilege and give the opinion only when the court orders him to answer; otherwise he would be justly subjected to criticism. In passing upon a case involving this question, Judge Cooley observed: "This evidence ought not to be passed over without remark. It is surprising evidence for many reasons. One of these is that the physician had no business to give it. . . . Every reputable physician must know of the existence of this statute and he must know from its very terms, as well as from the obvious reasons underlying it, that it is not his option to disclose professional secrets. A rule is prescribed which he is not to be allowed to violate; a privilege is created which does not belong to him but to his patient, and which continued indefinitely and can be waived by no one but the patient himself."[11]

The Privilege is Not to Protect Criminals.—According to the great weight of authority, the defendant in a criminal prosecution has no right to object to the testimony of a physician in reference to the victim of the crime on the ground that the information is privileged.[12] Also while the statute protects with the mantle of privilege, communications by one physician to another, in the presence of the patient during a consultation, still, where such statement incriminates the speaker with reference to an abortion which had been performed on the patient, and the speaker is subsequently a defendant to a suit relating to the abortion, the privilege of the statute will not avail.[13] But in a trial for abortion, where the woman survives, a physician who treated her will not be permitted to disclose her communications.[14]

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[9] Thomas *v.* Bryan, 168 Mich., 593.
[10] Harrison *v.* Sutter St. R. R. Co., 116 Cal., 156.
[11] Storrs *v.* Scougale, 48 Mich., 387.

Criminal Purposes.—If communcations are made to a physician for the purpose of furthering some criminal design or conspiracy, or some other violation of law, they would not be privileged.[15] The solicitation by a woman of a physician to perform an abortion on her, or to give her medicine for that purpose, would not be privileged and, should the fact ever become material to an issue in court, he would be a competent witness to testify thereto.

Presumption of Good Faith.—In the absence of evidence to the contrary, the court will presume that the communication was made for a lawful purpose and in good faith.

Statements Against Interest.—Where a party makes statements or admissions against his interests, and the matter thereafter becomes a subject of inquiry in court in a case to which he is a party, his statements or admissions are competent evidence for the purpose of establishing the fact in accordance with the statements or admissions. Of course, no such evidence is conclusive and the party is not precluded for making an explanation.

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[12] People *v.* West, 106 Cal., 89; Pierson *v.* People, 79 N. Y., 424; Siefert *v.* State, 160 Ind., 464; State *v.* Law, 150 Wis., 313.

[13] State *v.* Smith, 99 Ia., 29.

[14] People *v.* Murphy, 101 N. Y., 126.

[15] Hewitt *v.* Prime, 21 Wend., 79.

Adverse Statements.—It is a rule of evidence that incriminating or adverse statements freely made, out of court, by a party to a suit, may be introduced against him by his adversary if they are pertinent to the issue. The statements may be pertinent by being an admission of the fact in controversy, or of some collateral fact tending to prove the issue, or by being in contradiction of statements by the witness on the witness stand and, therefore, tending to impeach his testimony. From motives of public policy, certain exceptions to the rule have been introduced for the benefit of the party making the disclosures.

Adverse Statements in the Presence of a Party.—If statements against a party's interest are made in his presence and hearing, under circumstances that he ought to refute them but does not, the incident naturally raises an inference adverse to his interest or contention. In the administration of justice, courts recognize this rule of logic and when the person whose interest has been assailed becomes a party to a suit, the statements may be introduced in evidence, together with the fact of his silence or other attitude denoting acquiescence or admission. Thus, the failure of a physician to reply to the charge of his patient that he caused her to abort may be shown.[16]

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[16] Com. *v.* Brown, 121 Mass., 69.

CHAPTER VI

EXPERT WITNESS

An Expert Witness is one who has made the subject upon which he gives his opinion, a matter of particular study, practice or observation, and who has a special knowledge on the subject, which must be recognized in law as a distinct department of human knowledge and endeavor.

An *expert* is one who, in regard to a particular subject or department of human activity, possesses knowledge not possessed by ordinary persons;[1] a person instructed by a specially acquired information, knowledge and experience upon subjects presumably not within the range of ordinary intelligence and observation.[2]

Preliminary Inquiry as to Qualifications.—Whether a person who has been called as an expert has the requisite qualifications in the particular subject-matter involved to enable him to testify as an expert, is a preliminary question to be determined by the court, and the decision of the court is conclusive, unless it appears from the evidence to be clearly erroneous or to have been founded upon some error in law.[3] After a witness has been permitted to testify as an expert, the weight and effect of his testimony is a question exclusively for the jury, and is entitled to such weight and consideration as his skill and experience in the special subject of inquiry justify.[4] In determining the weight to be given to the testimony of an expert, it is proper for the jury to take into consideration the fact that he was specially compensated by the party in whose favor he testified.[5]

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[1] Sievert *v.* People, 145 Ill., 571; Jones *v.* Tucker, 41 N. H., 546.

[2] Page *v.* Parker, 40 N. H., 47, 59; Hyde *v.* Woolfolk, 1 Ia., 167.

[3] Parkins *v.* Stickney, 132 Mass., 218; Congress Co. *v.* Edgar, 99 U. S., 657.

[4] Davis *v.* State, 35 Ind., 496; U. S. *v.* Prendergast, 32 Fed., 198.

[5] Ware *v.* Starkey, 80 Va., 204.

Conduct.—The expert witness should endeavor to make his statements clear and intelligible to the ordinary listener. He must not forget that he is called upon to testify because the subject is not within the field of knowledge of the person to whom his testimony is directed and for whose benefit he is called as a witness. He should avoid as much as possible the use of technical terms and language suggestive of pedantry, subterfuge or display. He should shun even the suggestion of advertising himself or parading his accomplishments and speak with becoming modesty on all matters pertaining to his qualifications, experience and achievements. Able testimony may lose its convincing force by being preceded and introduced by a spirit of braggadocio. It is important to the expert to be familiar with the rules and practices of courts relating to the examination of witnesses, as it may save conflict with the attorneys and, possibly, even reprimand from the judge.

Confined to Special Knowledge.—When testifying an expert must be strictly confined to the limits of the special knowledge of his profession or occupation.[6]

Physicians as Experts.—The earliest recognition of expert opinion evidence was in the admission by the courts of opinions of physicians in matters pertaining to their special knowledge. The acceptance of this class of witnesses as experts is now so general that their opinions are taken in all matters pertaining to their profession.

In 1619, an ejectment case turned on the question of the legitimacy of a posthumous child, and the court, having first received "the testimony of two doctors of physic," held as a matter of law "that it might well be, as the physicians had affirmed, that ten months may be said properly to be the time of gestation." The record in this case closes by reciting,—"So the court delivered to the jury that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund.''[7] At a famous trial for witch-craft, at Bury St. Edmund's, in 1665, Dr. Thomas Browne, who testified as a ''person of great knowledge,'' after viewing the defendants, ''was desired to give his opinion what he had conceived of them, and that he was clearly of opinion that the persons were bewitched.''[8] The case does not disclose why a doctor should be any more competent to testify on that subject than a layman. In 1678, the testimony of medical men was admitted before the jury regarding the cause of blood in a certain portion of the body of a person supposed to have been murdered, and in the following year similar testimony was introduced before a jury concerning the cause of death.[9]

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[6] Milwaukee Co. *v.* Kellogg, 94 U. S., 472; Page *v.* Parker, 40 N. H., 47, 59; People *v.* Lehr, 196 Ill., 361.

Subjects of Inquiry.—In an action for malpractice against a physician, on a charge of negligence, a practitioner in the profession, or one who is skilled therein, may give his opinion, if material, as to whether the treatment complained of was proper and in accordance with the usual and customary practice, under the circumstances, and, if not, wherein it was not; whether the given operation was skillfully performed; whether the defendant, whom he has seen operate, is a skillful operator; whether the specified condition could have resulted from the specified treatment, or course of treatment; whether under the given conditions the specific methods, treatments, appliances or devices adopted were practical or approved by the profession; whether a given infection could have been induced at the time or in the manner alleged; whether the given condition was curable or incurable; whether the recovery was a fair, usual recovery; whether certain adverse results can, with proper skill and care, always be anticipated and avoided; whether an amputation was skillfully performed, and in fact on any subject of inquiry at issue coming within the range of his special skill, knowledge and experience.

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[7] Alsop *v.* Bowtrell, Cro., Jac., 541.

[8] Trial of Witches, 6 How. St. Tr., 687, 697.

[9] Trial of the Earl of Pembroke, 6 How. St. Tr., 1310, 1337; Rex *v.* Green, 7 How. St. Tr., 159.

When the fact is material to an issue in court a physician may give his opinion whether the given effects upon the sexual organs of a female might have resulted from her ravishment in the manner stated; whether pregnancy is likely to occur as a result of rape; whether penetration constituting rape has occurred; whether an infant was prematurely born and its age, or both; whether a person was sane or insane at a given time; whether fright caused by being put off a train would produce heart disease in a young child;[10] whether a condition was the result of previous wounds or injuries; whether death was caused by drowning; whether certain wounds were sufficient to cause death; whether a certain clot of blood could have existed twelve hours without causing death; and also the effects of wounds and injuries; the permanence of an injury; the cause of death; the probable results of disease and injuries; the effect on a person of a certain quantity of a particular drug, and the different effects from different quantities; the cause of a miscarriage; the effects of a nervous shock; the general cause of an injury or disease; from symptoms, how long a disease has been running; where there are several concurrent causes which might have produced death, that one cause operated to the exclusion of the others and, generally in all medical and surgical matters where an expert may be able to form an opinion, or draw a rational conclusion. Physicians may testify as medical experts, from given symptoms or from examination, whether or not an abortion has been committed on a woman, and, in case of death of the woman, whether or not death was the result of an abortion. These are matters peculiarly within the range of the expert knowledge of physicians.[11] Where an issue before the court and jury was the connection between an accident and an attack of appendicitis several months later, it was error for a medical witness to be permitted to say that "this was a traumatic appendicitis due to *this* accident." It would have been proper for the witness to have said "due to *an* accident."[12]

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[10] I. C. R. Co. *v.* Latimer, 128 Ill. 164, 170.

[11] Com. *v.* Leach, 156 Mass., 99; Com. *v.* Thompson, 159 Mass., 56; Slattery *v.* People, 76 Ill., 217.

Where an ordinary individual is as capable of determining a fact as a medical expert, expert testimony cannot be introduced. Thus, in a murder trial, in which the physical condition of the defendant fully appears from the evidence, from which the jury should be able to determine whether he was physically able to strike the blows causing the death, a physician testifying as an expert will not be permitted to answer a hypothetical question as to whether or not a person in the physical condition described in the question would be able to strike the fatal blows.[13]

Basis of Opinion.—An expert medical witness may base his opinion upon information

(a) Obtained by his own examination of the party and testified to by him in court; or

(b) Gained by him from testimony which he heard in the case in court; or

(c) Assumed by a hypothetical question propounded to him.

Hypothetical Question.—*A Hypothetical Question is one which states and assumes as true certain probative facts appearing in evidence, and asks the opinion of the witness thereon as to some ultimate fact in issue.*[14]

The facts are assumed to be true for the purpose of the question. As a matter of law, the proven facts must fairly justify the assumption. If the premises fail, the conclusion must be disregarded. The question need not assume all the facts.[15] On cross-examination any state of facts, if reasonably pertinent, may be assumed.[16]

It is well settled that when the testimony of experts is proper, counsel may assume the existence of any state of facts which the evidence fairly tends to justify, according to the theory of examining counsel, for the purpose of eliciting an opinion therefrom. A hypothetical question need not embrace all the evidence in the case, but may be addressed to any reasonable theory which may be taken of the facts.[17] Of course, the facts are assumed for the purpose of the question and the opinion thereon.[18] The value of the opinion will depend somewhat on the completeness with which the question contains all the facts in evidence, whether for or against the theory of examining counsel. Besides, the expert is entitled to know all the facts before being called on to express an opinion. But the opinion must be based upon the facts assumed in the question regardless of what other facts may be known to the witness at the time, and where the facts stated are not sufficient to enable the witness to form an intelligent opinion, he should so answer. Witness has a right to explain that he cannot form an opinion without information on certain other essential elements.

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[12] Moffett *v.* C. & S. C. Ry. Co., 209 Ill. App., 243.

[13] People *v.* Wynn, 324 Ill. 428, 441–2.

[14] Cent. Dict.

[15] R. Co. *v.* Wallace, 202 Ill., 129.

[16] R. Co. *v.* Fishman, 169 Ill., 196.

A hypothetical question may assume such facts, covering an entire situation, as are reasonably warranted by the evidence. As in the case of all other questions, its competency must be determined by the court.[19]

Symptoms.—The law recognizes two kinds of symptoms of human ailments and conditions, (a) Objective and (b) Subjective.

Objective Symptoms are those which can be observed or discovered by the physician without the aid of the patient; such as temperature, heart action, blood pressure, condition of blood, urine, feces, sputum, and other excretions, reflexes, etc.

Subjective Symptoms are those appreciated by the patient, but not discoverable by the physician alone; such as pain, nausea, etc.

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[17] R. Co. *v.* Wallace, 202 Ill., 129; Howard *v.* People, 185 Ill., 552.
[18] Stearns *v.* Field, 90 N. Y., 640.
[19] Oborn *v.* State, 143 Wis., 249.

Outward manifestations within the control of the patient are regarded as subjective symptoms.

A physician who has not treated an injured party but has examined him solely as a basis on which to found an opinion to be given in a trial to recover damages for injuries sustained by him, when called as a witness, cannot testify to the statements made by the injured party to him or in his presence, during such examination; nor base an opinion upon the statements of the injured party. In other words, an expert who has examined the patient for the sole purpose of testifying must base his opinion on objective symptoms, in so far as it is based upon his examination, and purely subjective symptoms must be disregarded.[20] However, there are some courts which do not apply this rule of admissibility, among which may be mentioned Alabama, California, Indiana, Massachusetts, New Jersey, Texas, Vermont and Wisconsin.

Cross-Examination of Expert.—In the direct examination of an expert witness, the facts assumed in a hypothetical question should be such as are fairly within the scope or range of the testimony, or reasonably inferable therefrom. However, upon cross-examination, any fact which, in the sound discretion of the court, is pertinent to the inquiry, whether testified to by any one or not, may be assumed in a hypothetical question with a view of testing the skill, learning or accuracy of information of the expert, or to ascertain the reasonableness or expose the falsity of the opinion he has expressed. Although a question goes beyond the scope of the evidence it may be propounded upon cross-examination if its purpose is to elicit the reason upon which the expert bases an opinion expressed by him in his examination in chief, or to ascertain the extent of his skill and learning in the particular subject upon which he assumes to be an expert.[21]

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[20] Eckels *v.* Mutschall, 230 Ill., 462.
[21] W. C. S. Ry. *v.* Fishman, 169 Ill., 196, 200.

Medical Books.—Ordinarily medical works or treatises on any other inductive science cannot be introduced in evidence nor read from by either party or by the physician witness for the purpose of showing the opinion of the authors.[22]

While medical works are not admissible in evidence to prove the things contained in them, still, where a medical expert, either on direct or cross-examination, says he bases his opinion upon what a certain text-writer says on the subject or claims that the writer corroborates him, the text may be read from on cross-examination to show that the author does not sustain the contention of the witness. This is permitted, not to show what the author says, but to prove that the witness was mistaken, and, to that extent, to discredit his tesitmony.[22]

Status of Expert Witness.—The general method of selecting a medical expert witness is for each party to the litigation to produce such witnesses in his favor as he is able to obtain. This system, *ipso facto,* classifies the witness as partisan, makes him a special pleader, and not only weakens the effect of his testimony, but also raises a suspicion of the honesty of his opinion. Courts have frequently criticized the system and sometimes, overlooking the real cause, have assailed the integrity of the medical witnesses. The expert should not forget that legislation and the courts never lead but always follow scientific progress. This fact sometimes puts the medical witness in a distinctly unfavorable position by apparently supporting contentions which are inimical, if not contrary, to the law. A trial judge was lately quoted as saying: "The court is pleased with the fact that the jury was discerning enough not to be misled by professional psychiatrists who are known as expert witnesses. I think they represent probably one of the greatest dangers to the administration of criminal justice in this and every other community. It is a known fact that the expert witness, called as an alienist or psychiatrist, is a man who usually takes the color of his opinion from the background of his fees. It is unfortunate that a Judge is compelled to rest in silence while witness after witness comes into court, without any pretense at examining the factors and hypotheses, and has an opinion ready for the mental portrait presented by the lawyers."

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[22] Bloomington *v.* Schrock, 110 Ill., 219; Yoe *v.* People, 49 Ill., 410; N. C. R. M. Co. *v.* Monka, 107 Ill., 340; Com. *v.* Brown, 121 Mass., 69.

The purpose of all disciplinary law is the welfare and protection of society. In fact, but for that object, government would have no right or excuse for interfering with the freedom of action of the individual. The necessity for interference arises without reference to the mental condition of the actor.

Originally all law was based on the theory that, for governmental purposes, there are only two classes of people in the world, *viz*: (a) the competent or legally responsible, and (b) the incompetent or legally irresponsible. Of course, we have learned that there are all degrees and grades in both of these classes, and that they shade imperceptibly into each other, and also that responsibility or irresponsibility often involve the question of the particular situation or act involved. Science has done much but cannot do everything. Generally speaking, we know the mind only as it is manifested by outward conduct and overt acts, and as a result disciplinary or protective procedure cannot be had prior to such manifestation of the mind. Science must devise the means to discover and control the mentally irresponsible before they have committed the overt act which subjects them to punishment or other discipline under the law. Until that method of handling this unfortunate class has been devised, the alienist will usually find himself in the unfortunate position, in the public eye, of trying to enable a criminal to escape the penalty of his crime, and his conduct will likely meet with the public condemnation which should be meted out under such circumstances.

CHAPTER VII

LICENSE

License is permission or authority to do a particular thing. License evidences the right to act. Medical license is permission granted by the state, to one found qualified, to practice medicine within the state.

Common Law Right.—*At common law any one might practice medicine or perform surgical operations. As a matter of law, no preliminary preparation and no license to practice were required.* This condition was also true within the jurisdiction of the civil law. Of course the practitioner was responsible to his patient for the exercise of an ordinary and reasonable degree of skill and knowledge, as measured by the standards of proficiency and professional learning at the time; but the State did not then attempt to prohibit incompetent persons from practicing nor to regulate the standard of proficiency by establishing minimum qualifications. The common law left it to natural selection, as it were, to eliminate the incompetent. But such method of elimination did not always protect the weak and confiding, as often the incompetence was not discovered until the patient was in his grave. The experience of the ages was that civil and even criminal responsibility for injurious consequences was not sufficient to deter the adventurer, the parasite, the pretender, the ignoramus, the impostor, the charlatan, from attempting the practice of medicine, and governmental control became an absolute necessity.

Right to Pursue Calling.—*To adopt and follow such lawful pursuit as he may see fit, when not injurious to the community, is a fundamental right and privilege of every American citizen.*[1] It is undoubtedly the prerogative of every citizen of the United States to follow any lawful calling he may choose, *subject only to such restrictions as are imposed upon all persons of like age, sex and condition.* This right may, in many respects, be considered as a distinguishing feature of our republican institutions. Here, all vocations are open to every one on like condition, but no one has a right to practice any profession, without the requisite knowledge and skill.[2]

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[1] Frorer *v.* People, 141 Ill., 171.

Public Welfare.—There is no arbitrary deprivation of such right, where its exercise is not permitted because of a failure to comply with reasonable conditions imposed by the state for the protection of society. While such laws are an invasion of the common law right of the individual, they are justified and enforced on the ground of *public necessity.* Ordinarily the law cannot interfere with freedom of private contract. Why should the citizen not be permitted to engage whomsoever he pleases to administer to him when he is sick? *The answer is, The public must protect itself against impostors, fakers, charlatans, empirics, ignoramuses and quacks.*

Control by State.—The state has the authority to fix a minimum qualification as a condition precedent to the right of a person to practice medicine. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as may be and are reasonably necessary to secure its people against the consequences of ignorance and incapacity, as well as deception and fraud.[3] Moreover, the police power of a state is not to be limited to guarding merely the physical or material interests of its citizens; their moral, intellectual and spiritual needs may also be considered.[4] The right of the state to regulate the practice of medicine and surgery by fixing a reasonable and uniform standard of requirement is universally recognized by the courts and has passed out of the realm of discussion. The courts uniformly hold that states may regulate the practice of medicine, and, for that purpose, may establish a standard of requirements, or may constitute a board of examiners with power to fix reasonable regulations for examination and standards of proficiency and fitness required on the part of applicants for license. It has been uniformly held that reasonable license statutes pertaining to the practice of medicine, are a lawful exercise of the police power; are not an unlawful abridgment of the rights and privileges of citizens; are not an infringement on the right of contract; do not deny a citizen the equal protection of the law; are not an unwarranted interference with vested rights and are not an unlawful delegation of legislative or judicial power.

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[2] Dent *v.* W. Va., 129 U. S., 114.

[3] Dent *v.* W. Va., 129 U. S., 114, 121; People *v.* Love, 298 Ill., 304, 16 ALR, 703.

[4] Barrett *v.* State, 220 N. Y., 428.

The tendency of modern practice and thought is to enlarge rather than restrict the supervisory activities of government in matters affecting the lives, health and general welfare of the people. The Supreme Court of the United States lately held constitutional a statute of New York making it unlawful to sell at retail at any store or established place of business "any spectacles, eye-glasses or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist . . . . be in charge over and in personal attendance at the booth, counter or place where such articles are sold in such store or established place of business."[5]

How Regulated.—The legislature may, by statute, (a) fix reasonable standards for determining the competency and fitness of applicants for license to practice medicine and surgery,[6] or (b) provide for a Board of Examiners and invest it with power to establish standards of competency and fitness.[7] Statutes usually provide for a medical board, or board of health, and leave the matter of fixing a standard of qualification to such board, and it has been held that such provision is not a delegation of either legislative or judicial power to an administrative body.

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[5] Roschen *v.* Ward, 279 U. S. 337, 73 L. Ed. 722.

[6] Williams *v.* People, 121 Ill., 84; 1 A. C., 18.

[7] *In re* Thompson, 36 Wash., 377; 2 A. C., 149; State *v.* Rosenkrans, 30 R. I., 374; 19 A. C., 824; People *v.* Hawkinson, 324 Ill., 285.

The right of a person to practice medicine involves a consideration of two fundamental facts,—(a) the standard to be applied; and (b) the qualifications of the applicant as measured by that standard. As above stated the legislature need not establish the standard, but may refer that requirement to a legally constituted board. However, not only the determination of the subjects of which one must have knowledge in order to be fit to practice a given profession, but also the extent of knowledge in each subject, the degree of skill requisite and the procedure to be followed in conducting an examination or otherwise determining the qualifications of the applicant, are matters which the legislature may appropriately commit to an administrative board.[8] Furthermore, it is not to be presumed that authority conferred upon an administrative board will be exercised arbitrarily, and a wide latitude of discretion is allowed an examining board in the administration of the law.[9]

Requirements.—The only proper test is, *Is the party competent, worthy and fit to practice the profession?* Of course, the nature and extent of the qualifications required must depend primarily on the state of the science at the time, but they should cover every field of the profession. If the standard is attainable by reasonable study and application, within a reasonable period of time, no valid objection can be successfully urged even though it is difficult to accomplish; but it must be reasonable in the light of present advancement and the requirements of the profession.[10] The nature and extent of the requirements, so long as they are reasonable and are fairly promotive of the public welfare, are matters for the legislative judgment in defining the policy of the state and the safeguards required.[11]

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[8] People *v.* Witte, 315 Ill., 282; Douglas *v.* Noble, 261 U. S., 165; Mutual Film Corporation *v.* Ohio Industrial Commission, 236 U. S., 230, 245, 246; Reetz *v.* Michigan, 188 U. S., 505.

[9] Lieberman *v.* Van de Carr, 199 U. S., 553.

[10] Dent *v.* W. Va., 129 U. S., 114; People *v.* Love, 298 Ill., 304.

Morality.—The public welfare requires not only *competence* in the practitioner but also *morality,* general *uprightness,* respectable appearance and reasonable *obedience to law.* A grossly immoral or criminal practitioner is more dangerous to society than one who is merely incompetent and, therefore, good moral character and a record free from crime are universally required of applicants, and the courts have uniformly held such provisions constitutional. The same body which is empowered to determine the competency of persons may also pass upon the other qualifications required, and reject those who do not fulfill reasonable demands in this behalf. Good moral character is a prerequisite to the practice of any profession. Such requirement has become a settled policy of all the states and *has been held to be indispensable to the exercise of the right under a license,* and must continue throughout the professional career.[12] The continual possession of a fair, private and professional character is essential to the right to continue practice.

Requirements Must be Reasonable.—Public welfare and interest are safeguarded when proper qualifications and fitness are assured. When that object is accomplished, interference should cease. A restriction should have some reasonable relation to the purpose to be attained.[13] The restrictive and classifying provisions of such statutes are uniformly considered void unless they are in fact in good faith reasonably within the necessities of the public protection and promotive of the public welfare.[14] A statute which requires that an applicant for license to practice shall have a diploma from some college in good standing, and shall pass an examination by the Board of Examiners has been held reasonable, even when there is no college in that state.[15] Also a statue which permits the Board of Examiners to determine whether an applicant for a certificate has graduated from a reputable college has been held not a delegation of judicial power to an administrative board, and the requirement not unreasonable but enforcible.[16] However, there must be no unreasonable classification with extra burdens on some, not on others.[17]

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[11] People *v.* Witte, 315 Ill., 282.

[12] People *v.* Meyerovitz, 278 Ill., 356, 365.

[13] Almond *v.* Nugent, 34 Ia., 300.

[14] Railway Company *v.* Jacksonville, 67 Ill., 37; Lakeview *v.* Cemetery Co., 70 Ill., 192; Babcock *v.* Buffalo, 56 N. Y., 268; Evarts *v.* Council Bluffs, 46 Ia., 46.

A corporation cannot be licensed to practice medicine, dentistry or law.[18]

Under the interpretation of the law in nearly all the states, corporations cannot be organized for the purpose of practicing medicine or any other profession.[19]

Soliciting Patients.—The State may impose on the practice of the profession any conditions which are reasonably promotive of the public welfare and those who are in authority for the time being are clothed with the discretion of determining whether a certain requirement meets the test. Experience demonstrates that in the medical profession at least, competition is not confined to efforts to excel in skill but frequently degenerates into a scramble for fees. Free competition sounds all right as a theory, but the test is, What is the result of its practice? Herbert Spencer's philosophy as announced in Social Statics, does not give sufficient consideration to certain human factors in the problem. "It is best," says he, "to let the foolish man suffer the penalty of his foolishness. For the pain, he must bear it as he can; for the experience, he must treasure it up and act more rationally in the future." [20] The lameness of this moralizing, when applied to the medical profession, lies in the fact that it is frequently addressed to the victim who has been sent to his grave by the empiric. Self-reliance is highly essential, but it is only foolhardiness which will not adapt means to ends. We can swim; but we don't swim the ocean. We use boats. By experience we have learned to recognize, and been taught to avoid, the deadly rattle-snake, but we don't rely upon this wisdom alone for protection, as we have also learned that a more complete safeguard is to kill him. Children are under the special protection of the law until they arrive at an age of sound discretion and the wisdom of the policy is attested by the approval of the ages. The policy of the law is to protect the weak, decrepit and helpless against the evil designs of the wicked, the crafty, the self-serving. Therefore, a law prohibiting licensed physicians from soliciting patients through paid agents has been held to be a valid exercise of the police power.[21]

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[15] State *v.* Littooy, 52 Wash., 87; 17 A. C., 292.

[16] *Ex parte* Whitely, 144 Cal., 167.

[17] State *v.* Gravett, 65 Ohio St., 289.

[18] State Electro-Medical Institute *v.* The State, 74 Neb. 40; Hannon *v.* Siegal-Cooper Co., 167 N. Y. 244.

[19] 14 C. J. 128, Note e.

[20] Spencer: Social Statics, 205.

Itinerant Vendors of Medicines.—This power of the state extends to the control of the practice of vending drugs, medicines and nostrums by itinerant physicians, peddlers and fakers.[22]

Intinerant Physicians.—Statutes regulating the sale and administration of drugs, nostrums and medicines by itinerant physicians and vendors have been generally enacted and, except on occasions of mere technical defects, have been uniformly enforced.[23] Such statutes are passed to protect the health and promote the welfare of society, and to safeguard the people against imposition, chicanery and fraud, and bring the profession of medicine under the control of the law and thus exclude the ignorant and unscientific from the practice.

City License.—A city ordinance which requires itinerant physicians to take out a license to sell their nostrums in the city, and which is not expressly limited to non-residents, is not void on the ground of unreasonable discrimination in favor of residents.[24]

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[21] Thompson *v.* Van Lear, 77 Ark., 506.

[22] Kirk *v.* State, 126 Tenn., 7.

[23] People *v.* Blue Mountain Joe, 129 Ill., 370; State *v.* Wheelock, 95 Ia., 577; 29 A. C., 1239, 1242.

Christian Science.—The practice of Christian Science healing *for a fee* was held to come within the provisions of a license statute of Ohio, the court holding that the intent of the legislature was to bring within its provisions every person who for a fee prescribes or recommends a cure for disease, even though the cure is to come, not through himself, but through his intercedence, from God.[25] It was also held that the act was not void because it did not make special provisions for licensing such healers on examination in accordance with their standards and professions. Another court, however, has said that "prayer for those suffering from disease, or words of encouragement or the teaching that disease will disappear and physical perfection be obtained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense."[26] Where the statute includes the treatment, healing or prescribing for any mental or physical ailment without words of limitation, it will include Science practitioners, faith healers and others of that type of ministration.[27] The policy of the law is to exclude the incompetent and unworthy from attempting to cure disease or heal injuries in whatever school or line he may practice, and it is asking too much to assume that all Scientist healers, or would-be healers, are competent, and therefore, all should be prohibited from practicing as a profession for a fee until they have devised a reasonable and practical means of eliminating the incompetent from among them.

Miscellaneous Practitioners.—One who diagnoses disease by alleged microscopic examination of the blood and proposes to cure disease by an application of light comes within the provisions of a statute requiring license of any person who shall profess to treat or prescribe for any physical ailment, and he does not come within the provision exempting opticians.[28] The giving of electric treatment for disease is practicing medicine.[29] Offering and trying to cure the opium habit by one who styled himself a doctor, is practicing medicine, for which he must procure a license.[30] One who, for a fee, professes to cure disease by dieting his patients, regulating their exercise and using spectacles, must be licensed as a physician.[31] One who professes to treat disease and injuries by Christian Science is required to procure a license to practice medicine or desist from his practice.[32] Where a person calls himself professor and pretends to be a magnetic healer and publicly professes to cure disease and heal injuries, comes within the law requiring license.[33] The practice of osteopathy is the practice of medicine.[34] A party who publicly anounces his ability to cure cancer by a preparation prepared by himself from herbs and vegetables, and undertakes for reward to cure persons so afflicted is practicing medicine, though he makes no pretense of being a doctor.[35] One who claims to cure diseases and prescribes and furnishes what he calls tissue food must take out a license.[36] A chiropractor is within the terms of a statute providing that any person shall be regarded as practicing medicine who shall for compensation diagnose, treat, operate upon or prescribe or advise for any physical or mental ailment.[37]

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[24] Fairfield *v.* Shallenberger, 135 Ia., 615.
[25] State *v.* Marble, 72 O. St., 21.
[26] State *v.* Mylod, 20 R. I., 637.
[27] State *v.* Buswell, 40 Neb., 158.

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[28] O'Neil *v.* State, 115 Tenn., 427.

[29] Davidson *v.* Bohlman, 37 Mo. App., 576.

[30] Benham *v.* State, 116 Ind., 112.

[31] State *v.* Edmunds, 127 Ia., 333.

[32] State *v.* Buswell, 40 Neb., 158.

[33] Parks *v.* State, 159 Ind., 211; State *v.* Heath, 125 Ia., 585.

[34] Little *v.* State, 60 Neb., 749; State *v.* Gravett, 65 O. St., 289; Jones *v.* People, 84 Ill. App., 453; Bragg *v.* State, 134 Ala., 165; 3 L. R. A., 762.

[35] State *v.* Huff, 75 Kan., 585; 12 L. R. A., 1094.

[36] State *v.* Breese, 137 Ia., 673; 24 L. R. A., 103.

[37] Board *v.* Freenor (Utah), A. C. 1917 E., 1156.

Itinerant Patient.—A physician who is regularly licensed in the state of his domicil may go with his patient, who is also a resident of said state, into any other state in search of health or recreation, and there continue to treat the patient without being amenable to the license laws of the state of temporary residence, and he may recover his fee for services in the latter state. As long as he confines himself to his transient patient he will not be considered as practicing medicine in the state of temporary residence.[38]

Optician.—An itinerant optician who announces that he does not give medical or surgical treatment, and who tests eyes and sells glasses to correct errors in refraction is not a practitioner of medicine, nor a vendor of "appliances intended for the treatment of disease."[39]

Right of Physician to Practice Dentistry.—In a State which requires dentists to procure a license before engaging in the practice of the profession, and fixes a penalty for practicing without a license, a regularly licensed physician will not be permitted to practice dentistry.[40]

Exemption of Resident Practitioners.—The statutes usually excuse from examination physicians who are practicing in the state at the time the law takes effect. Such exemption is legal and does not render the act void.[41]

Board Cannot Delegate Discretion.—The Board provided by license statutes for administering the same cannot delegate its rights to determine the qualification and fitness of an applicant for leave to practice, to another organization or body. An attempt to do so is treated as a refusal to exercise the discretion, and courts will interfere to compel action.[42]

Revocation.—The power to grant a license for competency and fitness, or refuse a license because of incompetency or unworthiness implies the power to revoke, for cause, a license which has already been issued. The causes which in the first instance, will justify refusing a license will ordinarily justify revoking the same. The issuing of such permit for supposed merit must necessarily imply the reservation of the right to revoke the same if it shall subsequently appear that it was obtained through mistake, by fraud, or by one not entitled thereto, or in event the licensee shall subsequently prove incompetent or unworthy. From the very nature of things, the objects to be attained, a license can be held only during good behavior and competency. The purpose of the law, namely, the protection of society, demands this interpretation.

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[38] Ziegler *v.* C. T. & S. Bank, 245 Ill., 180.
[39] People *v.* Smith, 208 Ill., 31.
[40] State *v.* Taylor, 106 Minn., 218; 16 A. C., 487.
[41] State *v.* Green, 112 Ind., 462; *Ex parte* Spinney, 10 Nev., 323.
[42] Board *v.* Cooper, 123 Ill., 227.

Professional Practice Is Not Property.—The right to continue the practice of a profession is often of great value and cannot be arbitrarily taken away any more than you can take away real or personal property, still such right is not property and does not amount to a contract with the state, within the meaning of those constitutional terms.

Vested Rights.—A license is not a vested right, nor an irrevocable franchise, but is at all times subject to the police power and the policy of the state in the protection of its citizens. A person cannot acquire an absolute vested right under a license for any definite period beyond the control of the police power of the state. A license to practice a profession confers no vested right or privilege above legislative control. A licensee takes the license subject to all the conditions and restrictions imposed by the law under which the same was issued or granted, including the reservation, express or implied, by the state of the right to revoke for cause, on proper notice and reasonable opportunity to be heard and also subject to amendment of the law The party accepting the license, takes the same subject to the right of the state to make further restrictions, requirements and regulations at any time the public welfare demands, and where such new restrictions and increased requirements are reasonable and fairly promotive of public health and weal, they will be sustained even though, in their enforcement, they have the effect of prohibiting some physicians from further engaging in the profession under a license previously issued.[43] The state has a right to require physicians to furnish evidence of continuing qualifications and fitness.[44]

CONSTITUTIONAL PROVISIONS.—Due process of law, or the law of the land means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as those maxims prescribe for the class of cases to which the one in question belongs. They do not necessarily refer to judicial proceedings. Private rights and enjoyment of property may be interfered with by the legislative or executive, as well as by the judicial, department of the government.[45]

REVOCATION NOT A JUDICIAL FUNCTION.—The revocation of a license to practice a profession is not necessarily the exercise of a judicial function, where all the formalities of courts of justice must be observed, and the action of a board invested with such power, in revoking a license, for justifiable cause, is not the deprivation of the practitioner of property without due process of law, in violation of section 8, Article 2 of the Federal Constitution.[46] Such act is only an exercise of administrative discretion,—an enforcement of the police power of the state, by the executive department. Investing an examining board with power to issue and revoke license for cause, is not, generally speaking, clothing it with judicial power, but rather investing it with administrative discretion.[47]

Grounds for Revoking.—A board has the power to revoke certificates issued to individuals for the same reasons it may refuse to issue such certificates. But the right of the citizen to practice his profession is too important to be taken away from him without some reasonable cause. The revocation must be based upon some act or conduct that would, in common judgment, be deemed immoral, unworthy, dishonorable or clearly unprofessional. Procuring a license by one who is grossly immoral, without disclosing his unfitness, is a fraud upon the public and will justify a rescission of the license, within a reasonable time, on proper notice and hearing. Thus, a license may be revoked for this frailty, even though the only evidence offered, or specifications given, are of act prior to the time the license was issued, or even prior to the passage of the law under which the license was granted. The law which permits such revocation is not *ex post facto*. The real ground of cancellation is want of good moral character at the time of complaint or hearing. Of necessity, this want can be proven only by past conduct, sufficiently recent to leave an inference of present delinquency; that is, by facts persuasive of existing character, which was built by a course of conduct. Acts are the cause; character the effect. In such case the party is not being tried for past offenses, but for present deficiency which the prior conduct tends to prove. If, in the meantime, a reformation has taken place, it should be susceptible of proof, and such fact must be within the knowledge, and the means of proof, therefore, must always be at the command of the accused.[48] But a license cannot be annulled from mere caprice and without cause, when fairly issued upon sufficient evidence of the applicant's fitness and qualifications.[49]

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[43] Reetz *v.* Michigan, 188 U. S., 505; 127 Mich., 87.

[44] State *v.* Webster, 150 Ind., 607; 8 L. R. A., 1272; *Ex parte* Garland, 4 Wall., 333.

[45] Chapman *v.* State, 34 Minn., 387.

[46] Wilkins *v.* State, 113 Ind., 514.

[47] France *v.* State, 57 O. St., 1.

A license may be revoked for immorality;[50] for fraud in procuring the same,[51] such as presenting a fraudulent diploma,[52] or one issued to another person;[53] for false statements in advertising, to the effect that the advertiser can cure all diseases, or statements which are calculated to deceive and defraud the public;[54] for sale of intoxicating liquors without a license therefor and without prescription;[55] for criminal abortion;[56] for maintaining two offices under different names, with the intent thereby to perpetrate a fraud upon the public;[57] for an advertisement relating to venereal diseases, in violation of law;[58] for commission of a felony;[59] for accepting money from persons in the last stages of consumption, under the representation that they were suffering from catarrhal bronchitis, when he must have known the truth;[60] for advertising to cure incurable diseases, where a statute prohibits the same;[61] and for conviction of an offense involving moral turpitude.

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[48] Moffett *v.* Packer, 66 Kan., 710.
[49] People *v.* McCoy, 125 Ill., 289.
[50] Moffett *v.* Packer, 66 Kan., 710.
[51] Curryer *v.* Oliver, 27 Ind. App., 424.
[52] Cully *v.* Territory, 19 Okla., 189.
[53] State *v.* Roy, 22 R. I., 532.

The making of statements and promises by a physician with reference to the treatment and cure of the sick and afflicted, which were calculated to deceive and defraud the public, were held unprofessional and dishonorable, and should properly subject the offender to a revocation of his license, when proceeded against in a legal manner.[62]

Construction of License Statutes.—Though, in a measure, in derogation of the common law, such statutes and regulations should be liberally construed to promote and accomplish the object of their creation.[63] To bring such statute within constitutional requirements, "or" will be construed to mean "and," on the ground that the legislature did not intend to pass an unconstitutional act, and also because, when a statute is reasonably susceptible to either of two constructions, that meaning must be adopted which will render it constitutional.[64] A proviso in a statute regulating the practice of medicine to the effect that nothing in the act shall be held to apply or to regulate any kind of treatment by prayer, does not render the act unconstitutional on the ground of granting to some special privileges and immunities.[65] Some statutes except from their operation those who heal by mental or spiritual means only, without the use of any drug or material remedy and without pretending to have any knowledge of the science of medicine or surgery, as a concession to Christian Science and other faiths.

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[54] State *v.* Examiners, 34 Minn., 387; State *v.* McCreary, 95 Ark., 511.

[55] State *v.* Goodier, 105 Mo., 551.

[56] Matthews *v.* Hedlund, 82 Neb., 825; Munk *v.* Frink, 81 Neb., 631.

[57] Rose *v.* Backster, 7 Ohio N. P. N. S., 132.

[58] Kennedy *v.* State, 145 Mich., 241.

[59] Spurgeon *v.* Rhodes, 167 Ind., 1.

[60] *In re* Washington, 23 Ont. Rep., 299.

[61] State *v.* McCreary, 95 Ark., 511.

[62] People *v.* McCoy, 125 Ill., 289.

[63] Smith *v.* People, 51 Colo. 270, 36 L. R. A., 158; State *v.* Yegge, 19 S. D., 234; 9 A. C., 202.

[64] Kirk *v.* State, 126 Tenn., 137.

Practicing Without License.—In a prosecution for practicing without a license, it is immaterial that the defendant is entitled to a license, or that the Board unlawfully withholds the same from him.[66] It is no defense to such prosecution that the complaining witness who was in the employ of the Board went to the office of the physician, solicited treatment and paid him for the services with the view of testifying against him.[67]

A person who aids and abets another in the practice of medicine or dentistry without a license is liable to prosecution under some statutes, although he himself may be regularly licensed to practice. The offense consists in helping the wrongdoer to violate the law.[68]

Practicing Medicine.—Parties charged with practicing medicine without procuring a license have frequently defended on the ground that their conduct did not amount to practicing medicine within the meaning of the law or that they came within specified exceptions, and therefore the courts have frequently been called upon to decide whether certain conduct amounted to practicing medicine.[69] The term medicine is not limited to substances supposed to possess curative, healing or remedial properties, but has the more general meaning of the healing art; that is, the science of preserving and promoting health and treating disease for the purpose of cure, whether such treatment involves the use of medical substances or not.[70] A person whose business is to detect and characterize disorders of the eyes by means of scientific devices and to correct defects of vision by means of lenses, although he does not attempt to prescribe medicine for diseased conditions, comes within the terms of a law declaring that any person shall be regarded as practicing medicine who shall publicly profess to treat any physical deformity by any system or method.[71]

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[65] *Ex parte* Bohannon, 111 Pacific, 1039; People *v.* Jordan, 156 Pacific, 451.

[66] State *v.* Mosher, 78 Ia., 321.

[67] State *v.* Littooy, 52 Wash., 87; State *v.* Smith, 152 N. C., 798; 30 L. R. A., 946, 954; 25 L. R. A., 341 *et seq* and 349 *et seq.*

[68] Gobin *v.* State, 9 Okla. Cr. 201; 131 Pac. 546.

[69] State *v.* Davis, 194 Mo., 485; 4 L. R. A., 1023.

Proceedings to Revoke.—When a license has been issued to a party, it invests him with certain rights which cannot be arbitrarily and summarily nullified. Certain formalities must be observed such as (a) the presentation of charges with specifications, (b) the giving of reasonable notice, (c) the production of evidence, (d) allowing opportunity to be heard in defense, and (e) the preparation and preservation of a record, and if they are disregarded the licensee may get relief in the courts.

(a) CHARGES.—Written charges setting forth the nature of the complaints need not be filed with nor prepared by the Board unless the statutes or the rules of the Board so require. In the absence of such requirement, the body charged with the duty of supervising practitioners may act upon an informal oral complaint. However, even in the absence of statutory requirement, it is desirable to require written charges signed by the party making them, specifying the nature of the offenses with which the licensee is charged. The complaint need not be drafted with the accuracy of an information or an indictment in criminal law; the allegations are sufficient if they challenge the attention of the Board and notify the licensee of the nature of the accusations made against him.[72] The complaint must set forth facts which constitute an offense and justify a revocation.[73]

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[70] People *v.* Siman, 278 Ill., 256.
[71] Baker *v.* State, 22 ALR, 1163.

Where written complaint is not necessary, but nevertheless one is filed, the evidence need not be confined to the written charges, but the record should show that the respondent was given a reasonable opportunity to explain or refute all the evidence adduced against him, and the records should show the consideration by the Board of all such matters and its conclusions thereon.

(b) NOTICE.—Notice to the person whose rights are involved is indispensable to the right to proceed against him. Before a license to practice medicine can be revoked by a board of examiners, the licentiate must be given due notice and a reasonable opportunity to be heard. Nothing is presumed in favor of the jurisdiction of such a body, and the particular facts necessary to confer jurisdiction must be made to appear from the record of its proceedings. If the records do not show such jurisdictional facts, the judgment will be void.[74] Whether the right to practice a profession is property in the technical sense, it is a valuable franchise and one of which a person cannot be deprived without an opportunity, by timely notice, to refute the charges preferred against him. Where a practitioner had a charge made against him of making statements and promises calculated to deceive and defraud the public, of which charges he had no notice, and of which he was never found guilty upon any evidence of their truth, an order of the Board revoking his certificate was unauthorized and void, and was set aside by the court.[75] In the absence of statutory requirement, or rule of the Board, any form of notice, oral or written, will be sufficient, but written notice personally served is so manifestly preferable as not to require recommendation. The notice should specify the general nature of the complaint, the time and place of the hearing, and be signed by the proper members or officers of the investigating body.

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[72] Moffett *v.* Packer, 66 Kan., 710.

[73] State *v.* Kellogg, 14 Mont., 426.

[74] Swearengen *v.* Gulick, 67 Ill., 208; Foster *v.* Glazenor, 27 Ala., 391; Harney *v.* Tyler, 2 Wall., 342; Freeman on Judgments, Sec. 123.

[75] People *v.* McCoy, 125 Ill., 289.

(c) EVIDENCE.—Evidence to support the charges and specifications must be introduced and the defendant must be given an opportunity to object to it and to refute it if he desires.

(d) DEFENSE.—When hearing complaints, either for discipline or revocation of license, such board is not a judicial body, and it is not required to adhere strictly to rules of procedure in court in the conduct of the hearing or in the introduction of evidence. The defendant physician is not entitled to a trial by jury, and it is not necessary that the proceedings shall be conducted with that degree of exactness required upon a trial for a criminal offense, in an ordinary judicial tribunal.[76]

(e) RECORD.—A record should be kept showing in detail the complete proceedings from the complaint to the finding and order. The revocation of a certificate cannot be sustained when it does not appear from the record of the proceedings that the Board, from evidence submitted to it, or otherwise, ever found the holder of the certificate guilty of any act or conduct that was unprofessional or dishonorable.[77]

Effect of Decision by Board.—Its decisions, made in good faith, after due notice and reasonable opportunity to be heard, are binding on the courts unless clearly and manifestly wrong and oppressive. Such bodies are a department of the administrative affairs of government, not corporate bodies, and may not be interfered with by the courts, except for arbitrary refusal to act, for oppressiveness or for unauthorized, unjust or arbitrary conduct.[78] The courts are not concerned in the right or wrong of such decisions unless an appeal to the courts is expressly provided by statute. However, this is a government of laws, not of men, and our courts must be the final arbiters where any oppressive or illegal element is involved.[79]

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[76] Munk *v.* Frink, 81 Neb., 631.

[77] People *v.* McCoy, 125 Ill., 289.

[78] Iowa E. M. C. A. *v.* Schrader, 87 Ia., 659; State *v.* Fliescher, 41 Minn., 69; U. S. *v.* Hitchcock, 190 U. S., 324; Harding *v.* People, 10 Colo., 109; State *v.* Examiners, 34 Minn., 387.

Statutes of Limitation.—The object of a revocation of license is the future protection of society, not the punishment of the licensee. Therefore, the usual statutes of limitations do not apply to such proceedings, and a party may have his license revoked for an offense for which he cannot be prosecuted criminally, owing to the statute having run against the offense.[80]

Revocation and Criminal Prosecution.—A license may be revoked for a criminal offense before the party has been prosecuted for the crime and even after he has been found not guilty in a criminal suit, as the criminal prosecution and the revocation of the license are absolutely independent proceedings,[81] and have different objects in view.

Pardon.—A general and unrestricted pardon of a doctor sentenced on conviction of manslaughter for criminal malpractice does not restore his license which had theretofore been revoked in a separate proceeding by the proper board for the causes involved in the criminal prosecution.[82]

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[79] Boyd *v.* U. S., 116 U. S., 616.

[80] State *v.* Stewart, 46 Wash., 79; 11 L. R. A., 557; *in re* Lowenthal, 78 Cal., 427; *Ex parte* Tyler, 107 Cal., 78; State *v.* Schaeffer, 129 Wis., 459; People *v.* Hooper, 218 Ill., 313; L. R. A. 1915 D, 1218.

[81] Munk *v.* Frink, 91 Neb., 631.

[82] State *v.* Hazzard, 139 Wash. 487; 247 Pac. 957; 47 ALR 538.

CHAPTER VIII

CONTRACTUAL RELATIONS

General Observations.—The relation of patient and physician is contractual in character, two consenting minds being necessary to create the same. In other words, it is voluntarily assumed,—not imposed by law as a matter of duty and public policy. In fact most relations in life are voluntary in nature, and when voluntary a party may avoid their responsibilities by refraining from entering into them, but, generally speaking, he cannot enjoy their benefits and emoluments without incurring the obligations which the law, as a matter of public policy, imposes thereon. The marriage relation is a good illustration of the extent to which public policy ingrafts responsibilities on contracts between parties, even irrespective of their intentions or wishes. The relation of physician and patient creates rights and obligations which the parties may not have discussed and of which they may have been ignorant at the time.

Contract.—Not only is the relation in question founded on agreement of the parties, express or implied, but also all transactions between a physician and his patient are based upon contract and, therefore, the general principles of the law of contracts apply.

In its widest acceptation, contract is the basis of social and political organization. In this meaning of the term all obligations of the individual to society or to government result from his implied agreement. Here, *contract* is synonymous with *duty.* The individual has contracted to do and to refrain from doing all that which, in the then conception of right and wrong, it becomes his *duty* to do or not to do. But, according to the use of the term in law, contract has a more definite meaning. "Jurisprudence is concerned with such rights only as are recognized by law and enforced by the power of the State." A right which cannot be enforced in law is an imperfect obligation.

"A Contract is an agreement between two or more competent persons, upon sufficient consideration, to do or not to do some lawful thing."[1]

KINDS.—Contracts may be said to be (1) *express* or (2) *implied,* and the latter may be again divided into (a) those in which the *agreement is a natural* and reasonable *inference* from the facts and circumstances of the transaction, and (b) those in which *the law imposes the duty as a matter of public policy* irrespective of the real intention of the parties. The latter are sometimes called *constructive contracts.*[2]

An *express contract* is one in which the parties have declared orally or in writing the terms of their agreement.

An *implied contract* is one in which the terms of the agreement (a) are an inference of fact or law deduced from the conduct of the parties in relation to its subject matter, or (b) are imposed by law as a matter of public policy. In the latter sense, contract is equivalent to legal duty. It is a well recognized maxim, though not of universal application, that whatsoever a man ought to do the law supposes he has promised to do. *"Implied contracts are such as reason and justice dictate and which, therefore, the law presumes that every man undertakes to perform."*[3]

A contract may be partly express and partly implied, partly oral and partly written; but, where there is a complete express contract there cannot be implied provisions inconsistent therewith. An express and an implied contract cannot both exist in the same part of a transaction, or touching the same right or obligation. Where an express contract is shown, there cannot be maintained an action based upon an implied agreement as to the same matter, neither against a party nor against a third person.[4] An express agreement necessarily excludes an implied one.[5] What is implied in an express contract is as much a part of it as what is expressed.[6]

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[1] 2 Bl. Com., 446.

[2] Hertzog *v.* Hertzog, 29 Pa. St., 465, 468.

[3] 2 Bl. Com., 443.

WRITTEN CONTRACTS.—A written contract is one which, in all its terms, is reduced to some form of written language.[7] All prior propositions are superseded by the written agreement, and all prior and contemporaneous stipulations, material to the contract, are merged in it.[8] The written contract is presumed to contain all the agreement and when it appears to be complete the burden of proof is upon the party who seeks to establish the contrary.

PARTLY WRITTEN, PARTLY ORAL.—But where only part of an agreement has been reduced to writing, extrinsic evidence is admissible to show the complete contract.[9] When a written contract is so incomplete as to require resort to extrinsic evidence to make it enforcible, it may be treated as an oral agreement.[10]

Delivery.—A written contract takes effect, if at all, upon *delivery of the instrument, unconditional and as a contract.* Where there is no delivery there is no contract.[11] If delivery is conditional, the condition must be performed before the contract will become effective.[12]

Executed and *Executory* is also a classification of agreements. In an *executed* contract both parties did all that they were required to do under the agreement, at the time it was entered into. It creates rights *in rem*; it gives title to property at the time of its execution. Technically this is not a contract at all, but merely evidences a completed transaction. When the agreement is reached, all acts are performed and, in the absence of fraud, accident or mistake, that is the end of it. Each has received something as an equivalent for what he gave. In an *executory* contract something remains to be done by one or both parties after the execution of the agreement. It contemplates something in the future, and creates rights *in personam* and *in rem.*

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[4] Shaw *v.* Graves, 79 Maine, 166; Ford *v.* McVay, 55 Ill., 119.

[5] Ramming *v.* Caldwell, 43 Ill. App., 175.

[6] Hart *v.* Otis, 41 Ill. App., 432.

[7] Memory *v.* Niepert, 131 Ill., 630.

[8] School Dist. *v.* Stilley, 36 Ill. App., 135; Covel *v.* Benjamin, 35 Ill. App. 299; Casselberry *v.* Warren, 40 Ill., App., 627.

[9] Covel *v.* Benjamin, 35 Ill. App., 299.

[10] Plumb *v.* Campbell, 129 Ill., 106; Wood *v.* Williams, 40 Ill. App., 117.

[11] Bierdeman *v.* O'Connor, 117 Ill., 493.

[12] Jordan *v.* Davis, 108 Ill., 336.

Mutuality.—*Executory contracts must have the quality of mutuality:* if one of the parties is bound the other must be bound also; if one is at liberty to refuse performance the other cannot be compelled to discharge his promises.[13]

Parties.—*Two competent parties are essential to the making of a contract.* A person cannot contract with himself.[14]

Any person not under legal disability is competent to contract. Infants and persons of unsound mind do not have full legal capacity to become parties to binding obligations, and courts will set aside contracts which are not manifestly to their advantage. However, to justify the setting aside of a contract on the ground of mental incapacity of one the parties to it, the mental debility must be such as, in law, renders the person incapable.[15]

Contracts by Infants.—Infants may make binding obligations for necessaries actually furnished them by accepting the same, but not for money loaned them, though subsequently invested in necessaries. Necessary medical or surgical treatment within reasonable limits, is a legal necessity, for which a minor will be held liable.[16]

Persons Under Legal Disability.—The foregoing propositions relative to minors apply to all persons under legal disability.

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[13] Weaver *v.* Weaver, 109 Ill., 225.

[14] Nelson *v.* Hayner, 66 Ill., 487.

[15] Perry *v.* Pearson, 135 Ill., 224, 230.

[16] People *v.* Pierson, 176 N. Y., 201, 302; *See* Gilman *v.* Andrus, 28 Vt., 241; Strong *v.* Foote, 42 Conn., 203, 205.

Consideration.—The law of contract is a natural concomitant of the private ownership of property and the necessary exchange thereof occasioned by diversification of industry and the wants and desires of men. In a business sense, contract may be considered as having its origin in the transfer of private property. Even a contract for services, while not immediately referring to property, usually contemplates, in its ultimate analysis, the production of values as the result of the services. The parties have in view this fact at the time of agreement. The effect of labor expended in value produced, or wants satisfied, is the basis of the negotiations. How much value or satisfaction will the exertion of muscle or brain create, is the question upon which the contract depends.

Equivalence.—The idea of equivalence enters into every business transaction. In matters of business a man does not part with his right to an article which is capable of satisfying some want without receiving therefor the satisfaction of some desire or some other article equally and similarly potent. Therefore, two things of value, and only two, are essential to every contract, namely (a) the thing given, and (b) the thing received. These are called the consideration. In the preliminary stage of a contract, the minds of the parties weigh and compare these two things. When they agree as to the equality of their values, the exchange of the right therein is made and the contract is complete. This comparison in values is a matter entirely for the parties to the contract, and when, in the absence of fraud or undue influence, they have agreed upon their equivalence, the question will not be investigated by legal tribunals. Courts will not revise the judgments of the parties to a transaction in the matter of the equality of the respective considerations, except for fraud or undue influence. The inference is that, on entering into a contract, every man intends at least to acquire an equivalent for what he gives. Where nothing is to be received, the inference is that there has been no agreement. Courts will not enforce performance of a promise for which there has been no consideration. This was the case in the civil law, in which such an agreement is called a *nudum pactum.* In such cases the obligee did not change his position and is in no worse situation by reason of the promise having been made and, therefore, has no standing in court when he seeks to enforce perfomance of a promised gratuity.

Promise for Promise.—One promise is sufficient consideration to support another promise.[17]

Benefit or Detriment.—Any benefit to the promisor or detriment to the promisee is sufficient consideration for a promise.[18] Thus, medical services rendered by A to B or to C, at the request of B, are sufficient to support B's promise to pay A therefor. The consideration must consist of a present act or of a future act promised. The act cannot be in the past.[19]

While the *acceptance* of the services of a physician raises an implied promise to pay what those services are reasonably worth, the mere fact that such services are beneficial to the patient does not justify such inference; thus it may be of lasting benefit to the patient to have had a certain operation performed, but the operator cannot recover for his services in performing the operation if it was done over the objection or without the consent of the patient.

Effect of Signing Contract.—Where a party, adult, of sound mind and able to read and write, and who has had full opportunity to read a contract, signs it without reading, he is bound by its terms and provisions, in the absence of fraud or other equitable considerations.[20]

Validity of Contracts.—As a general proposition, a contract which is valid at the place where it is executed, is valid any place in the world.[21]

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[17] Bishop *v.* Busse, 69 Ill., 403.

[18] Buchanan *v.* International Bank, 78 Ill., 500.

[19] Johnson *v.* Johnson, 31 Pa. St., 450; Curry *v.* Shelby, 90 Ala., 277.

[20] Seymour *v.* Mackay, 126 Ill., 350.

[21] Pecks *v.* Mayo, 14 Vt., 33; Roundtree *v.* Baker, 52 Ill., 241; 9 Cyc., 672.

Constitutional Right to Contract.—The right to enter into lawful contracts is as sacred as life, liberty of the pursuit of happiness. The inviolability of the obligations growing out of contract, equally sacred as the right of contract itself, is a matter of supreme moment to industrial prosperity. The enforcement of such obligations is a duty imposed upon legal tribunals wherever governments assume to protect business affairs. Impressed with the importance of maintaining inviolate the right to demand fulfillment of promises according to their terms, the framers of the Federal Constitution provided therein that no State shall pass any "law impairing the obligation of contract." This obligation may not be impaired by a state through its legislature;[22] nor by its courts;[23] nor by the people of the state.[24] This inhibition applies to contracts to which a state is a party, and to cases where the contract is in the form of a statute, or grant.[25] Both executed and executory contracts are included in this constitutional provision.[26]

Guaranty.—If work be done for a person on the guaranty of another that the services will be paid for by the guarantor, if needs be, the guaranty should be in writing; but if the services be rendered upon an unconditional promise of a third person to pay for them, the promise need not be in writing, but the credit should be given to the promisor, and not to the party for whom the services were rendered. The test is, Was the whole credit given to the third person? If the undertaking of a person who agrees to answer for another is collateral or conditional, it must be in writing, but if direct and original it need not be.[27] Where the guaranty is in writing, the account may be kept in the name of the patient; but if the third person is to be held as an original obligor, the account should be entered in his name.

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[22] People *v.* Canal Trustees, 14 Ill., 420.
[23] Harmon *v.* Auditor, 123 Ill., 122.
[24] Railroad Company *v.* Hoyt, 1 Ill. App., 374.
[25] Bruce *v.* Schuyler, 4 Gilm., 221.
[26] Dartmouth College *v.* Woodward, 4 Wheat., 518.
[27] Smith *v.* Hyde, 19 Vt., 54.

Doing the work at his request is sufficient consideration for his promise to pay whether direct or collateral, regardless of his relation to the beneficiary of the services. In other words, the consideration for a promise may be either a benefit to the promisor or a detriment to the promisee[28] Courts will not enforce promises for which there has been no consideration. Such promises are imperfect obligations and are called naked promises.

Receipt.—A receipt in writing is not conclusive, but is open to explanation, correction or contradiction by oral testimony or other evidence. It is regarded as evidence of a high character and, to overcome it, the evidence should be clear and convincing.[29] A receipt in full of a liquidated claim is not conclusive evidence of payment in full, and is subject to contradiction and explanation. In the absence of other proof it establishes payment in full.[30] Payment in part of an undisputed claim, which is due, is no consideration for an agreement that the payment shall be in full, because the debtor has done only what he was legally bound to do, and, after such partial payment, the creditor may proceed to collect the balance, but a partial payment before due may be sufficient consideration for an agreement to release the balance.[31]

The compromise and settlement, for any reasonable consideration, of a doubtful or speculative claim, is a sufficient consideration when made with knowledge and without fraud, and receipt in full, in connection with such compromise, is binding on the party giving it. A receipt in full for an unliquidated or honestly disputed claim, accepted in good faith and obtained without fraud, is binding on the party who issues it. Thus, where a physician has no agreement as to his charge for services, his claim would be said to be unliquidated, and if the patient, honestly and in good faith misunderstood the terms and conditions or honestly disputed the value of the services, the acceptance of payment and the giving of a receipt in full, as a condition therefore, would be binding on the physician. A written instrument which operates both as a contract and a receipt, may be enforced as a contract and be corrected or contradicted as a receipt.[32]

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[28] Morgan *v.* Park National Bank, 44 Ill. App., 582.

[29] Walrath *v.* Norton, 5 Gilm., 437; Cunningham *v.* Baars, 36 Minn., 350, 353; Winchester *v.* Grosvenor, 44 Ill., 425; Rockford R. Co., *v.* Rose, 72 Ill., 183; 165 Ill., 161, 182.

[30] Lyons *v.* Williams, 15 Ill. App., 27; Neal *v.* Handley, 116 Ill., 421.

[31] Wolford *v.* Powers, 85 Ind., 294, 304; Smith *v.* Bartholomew, 1 Metc. (Mass.) 276; Smith *v.* Phillips, 77 Va., 548; Shepard *v.* Rhodes, 7 R. I., 470.

Release.—*A Release is a quittance, remission or discharge* of a right of action. It is a unilateral contract. As in the case of all other contracts, a release must be supported by a consideration. The agreement may be oral but it is advisable to reduce the same to writing and have it executed under seal. In fact, the term release implies a writing under seal.[33] At common law a seal imports consideration and obviates the necessity of introducing any other evidence of that fact. A written release, like any other written contract, cannot be contradicted, varied or modified by parol evidence.

A release of an employer for damages from injuries received by an employe has been held to be a release of the physician for malpractice in treating the injury.[34]

RELEASE AND RECEIPT COMPARED.—A receipt is not a contract, it is only an admission of payment and may be contradicted, modified or impeached.[35] A receipt is merely evidence of the fact of payment, while a release extinguishes a pre-existing right; and, while a receipt in full may be explained or modified or contradicted, a release under seal forever estops and concludes the party.[36]

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[32] Hossack *v.* Moody, 39 Ill. App., 17.

[33] I. C. R. R. Co. *v.* Read, 37 Ill., 484, 511.

[34] Martin *v.* Cunningham, L. R. A. 1918 A, 225.

[35] Gillett *v.* Wiley, 126 Ill., 310.

[36] Frink *v.* Bolton, 15 Ill., 343; Crane *v.* Alling, 15 N. J. L., 423; Equitable Security Co. *v.* Talbert, 49 La. Ann., 1393.

CHAPTER IX

EMPLOYMENT AND COMPENSATION

EMPLOYMENT

Accepting Service.—Knowingly accepting the services of a physician is usually *prima facie* evidence of employment, whether raised in action for malpractice or for a fee.

Unconscious Patient.—Where a party receives an injury which results in unconsciousness, and from which he dies without regaining consciousness, and a surgeon, summoned by a spectator, renders professional services in a *bona fide* endeavor to save the victim's life, a claim for services against the patient's estate, by the surgeon is sustained on the legal fiction of a contract in order to afford a remedy which the justice of the case requires.[1] Such services are regarded as a necessity and the law places the patient in the same category as infants and others incapable of entering into contracts. The reasons upon which this fiction rests are too broad and humane to be overborne by any deduction which a refined logic may make from the circumstances that in such cases there can be no meeting of the minds of the parties.[2]

Employment by Third Person.—A mere request by a third person, of a physician, to render services to another, does not constitute an employment by such party nor rasie an implied promise on the part of the person making the request, to pay for the services.[3] However, where medical services were rendered by the plaintiff to a third person upon request of the defendant, the court held that the liability was established by proof (a) that the services were rendered at the instance and request of the defendant, (b) that when the plaintiff proposed to discontinue his visits, the defendant requested him to continue them and (c) that, when the plaintiff presented his bill to the defendant, the latter did not deny his liability, but disputed the amount.[4] If the relation to the patient of the person who requests the services is not such as imports a legal obligation to provide them, the person so requesting the services will not be bound (a) unless there has been an express agreement or (b) unless it may be fairly inferred from the evidence that it was the intention of both parties that the services should be performed by the physician and that the person requesting them should pay therefor.[5] Where a person called at the office of a physician in a hotel and, on being informed that the physician was out, wrote on a card, having his name and address printed thereon, the words "Call on Mrs. Day at No. 769 Broadway" and handed it to the hotel clerk with the request to give it to the physician and tell him to go as soon as possible, and where it did not appear that credit was originally given to the patient, and where a jury found for the physician under all the circumstances, the court held that such person became liable to pay for the physician's attendance and services upon Mrs. Day.[6] It must appear from the evidence that the physician understood that the party calling him was to be responsible and this understanding must have been either by direct statement or reasonably deduced from all the evidence and circumstances in the case, and it must also appear that the physician extended the credit in the first instance to the third person.[7]

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[1] Cotnam *v.* Wisdom, 83 Ark., 601; 12 L. R. A., 1090.

[2] Sceva *v.* True, 53 N. H., 627; Sherman's estate, 6 Pa. Co. Ct., 225.

[3] Starrett *v.* Miley, 79 Ill. App., 658.

Ordinarily a master is not liable for the services of a physician summoned in his temporary absence by his manager to attend an employee, who was injured in an accident in the course of his employment.[8] Also a railroad or other transportation company is not liable for the services of a physician called by a by-stander to attend a passenger who was injured, whether the accident was the fault of the company or otherwise. Of course, where a custom of the company of paying for such services can be shown, a promise might be implied, and, where the party calling the physician is an employe of the company, the nature of his duties may be such as to imply authority to bind his employer in that behalf.[9] Even though the master personally summons the physician where the patient is unable to do so, he will not be liable for the services. Other facts must be shown, before he can be held.[10]

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[4] Curry *v.* Shelby, 90 Ala., 277.

[5] DeLee *v.* Hyman, 219 Ill. App., 651.

[6] Bradley *v.* Dodge, 45 How. Pr., 57; Clark *v.* Watterman, 7 Vt., 76.

[7] Starrett *v.* Miley, 79 Ill. App., 658; Morrell *v.* Lawrence, 203 Mo., 363.

COMPENSATION

History.—*At common law, professional men could not sue and recover for services rendered, nor even contract beforehand for pay for such services.* This grew out of a supposed analogy with the legal profession, the law having had its origin at a time when the lawyer was in fact an official of the court. The patient might pay the physician if he chose to do so, and it was always lawful for the latter to accept such remuneration, but the question of pay was entirely within the discretion of the patient. The physician had no right which he could enforce in court. The law on this subject has undergone a complete revolution and, at the persent time, professional services stand upon the same footing, as to compensation, as all other services.

The recognition of the right of a physician to charge a fee for his services is not of recent origin. The Code of Hammurabi (B.C. 2285–2242) regulated the fees physicians could charge for their services and also imposed penalties for malpractice.[11]

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[8] Holmes *v.* McAllister, 123 Mich., 593; Sevier *v.* R. Co., 92 Ala., 258; Clark *v.* R. Co., 48 Kan., 654; Godshaw *v.* Struck, 109 Ky., 285.

[9] Hanscom *v.* Minn. St. R. Co., 53 Minn., 119; R. Co. *v.* Davis, 126 Ind., 99.

[10] Norton *v.* Rourke, 130 Ga. 600, 18 L. R. A. 173.

Agreement as to Fee.—Where the fee is agreed upon, such agreement, if reasonable, will control, in the absence of fraud or undue influence.[12] In the absence of fraud or duress, a physician may stipulate any price for his services, and when once rendered, he can recover the contract price therefor. This presumes that the contract is made before the relation of physician and patient is created. Where such relation exists, the fiduciary nature thereof prevents the physician contracting for more than a fair and reasonable fee for his services.

No Agreement as to Fee.—Generally one who, without previous agreement, knowingly accepts services from another is bound in law to render compensation to the extent of the reasonable value thereof. The law presumes that he agreed to do so, and that such understanding was in the minds of both parties at the time the work was done. Liability is based upon the broad principle that the law will require a party to do what he apparently promised to do, or what he ought to do, regardless of his real, undisclosed intention in the premises. In the absence of previous agreement, a physician is entitled in law to reasonable compensation for his services and the medicines and materials furnished by him. The basis of the obligation to pay may be either (a) a benefit to the patient, or (b) a detriment to the practitioner, or (c) the two combined.

Benefit to Patient.—Both in fact and in law the origin and foundation of the relation of patient and physician is a supposed benefit to be derived by the patient. Eliminate this idea from the minds of the people and the profession will cease. It is absurd, therefore, to suppose that the result of the treatment should in all cases be entirely ignored in questions of the reasonable value of the services.

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[11] Hughes *v.* State Medical Examiners, 162 Ga. 246; 54 ALR 1504.

[12] Doyle *v.* Edwards, 15 S. D., 648; Burgoon *v.* Johnson, 194 Pa. St., 61.

Proper Treatment Required.—The physician must be prepared to show that his treatment was proper, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed what he undertook to do and the consideration fails,[13] except to the extent his patient was benefited.

A practitioner is employed to treat his patient properly, and a departure therefrom is a change of the employment. Where the fault of the practitioner is an element in the final result he can recover only the value to the patient of his services. If, by such test, they had no value, he can recover nothing and, if the patient was damaged thereby, an obligation may rest on the practitioner to respond therefor. If the patient in fact received no benefit from the treatment sued for, and this result was due to the lack of ordinary professional skill and care of the practitioner, or was because of his failure to exercise such skill and care to discover or treat the case, there could be no right on his part to recover from the patient for his services. Where the practitioner is guilty of a breach of duty, failure to relieve may be taken into consideration in determining the amount to which the practitioner is entitled, since the basis of the claim then becomes the benefit derived by the patient from the services, when the same is susceptible of demonstration.[14] If the value of services is affected by the fault of the physician in the performance of his duty, he did not do what he was employed to do but, in reality, departed therefrom and he is held responsible for results. Therefore, when he is at fault, he is entitled to compensation only as and to the degree he benefited his patient.

DETRIMENT TO PHYSICIAN.—The event of the treatment so generally lies with the forces of nature that all intelligent men know and understand that the physician is seldom responsible therefor, hence, where the services were properly performed, benefit to the patient, in the absence of special agreement, is not essential to the right of recovery for such services.[15] Therefore, since a physician is not an insurer of the success of his treatment he is entitled to the reasonable value of his services, whether he succeeds in curing his patient or not, provided he acts in good faith, uses the skill and care of an ordinarily skillful and careful physician, and exercises his best judgment.[16] It cannot always be determined beforehand whether he can be of any benefit to his patient; in fact he may respond promptly to a call and, on his arrival, find his patient dead. Having attempted to discharge his duty to his patient and being prevented by no fault of his own he is entitled to be reimbursed for his efforts made in good faith. It is a general law of service that so long as the servant does his duty *faithfully, promptly* and *properly,* he is not concerned in the real value of his efforts to his master. The determination of that question is exclusively with the latter and, so long as he continues to accept the services, he must pay for them, regardless of their real value to him. Suppose, in the last illustration, that the physician, after accepting the call, delayed unnecessarily, and without reasonable cause or excuse to respond to the call, a different and probably controlling element would be injected into the problem. By delay he breached the contract. He departed from the implied agreement. He was not employed for that purpose. If he did his patient no good, and if such result was due to his own fault, then he should not be entitled to any compensation.

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[13] Basten *v.* Butter, 7 East, 479.

[14] Ely *v.* Wilbur, 49 N. J. L., 684; Gallaher *v.* Thompson, 1 Wright (Ohio), 466; Kanna *v.* McMullen, 1 Peake, 83; Hupe *v.* Phelps, 2 Stark, 424.

A physician has the right, in the absence of a custom of his own, to the contrary, to charge for his visits, day or night, at least the fee sanctioned by the custom of the community in which he lives, and he is not obliged in so doing to rate himself below the class to which, in his opinion, he properly belongs, and in such case the burden rests upon the patient, who refuses to pay, to show a better reason for such refusal than that the physician is comparatively fresh from a seat of learning.[17]

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[15] Ladd *v.* Witte, 116 Wis., 35; Cotman *v.* Wisdom, 83 Ark., 601.
[16] Yunker *v.* Marshall, 65 Ill. App., 667; Logan *v.* Field, 75 Mo. App., 594.

Special Agreement as to Result.—Where a professional man makes a special agreement to afford relief to his patient, or to accomplish any other specific result, he cannot recover either for services rendered or material supplied, unless he reasonably accomplishes what he promises.[18] An agreement to do work to the satisfaction of another, means to do such work as the party should be satisfied with. He cannot object to it from mere caprice or to avoid his obligation.[19]

Services During Life of Patient.—An agreement to render medical services to a patient as long as he lives, for a stipulated sum to be paid by the estate of the patient, has been held by some courts to be against public policy on the ground (a) that it gives the physician a distinct benefit in the death of his patient, whereas his interest and desire ought to be to prolong the life of the person under his professional care, and (b) that it is a wagering contract.[20] However, some courts have not adopted this reasoning, but it is manifestly advisable for a physician never to put himself in a position where he will apparently profit by the death of his patient.[21] Where the consideration of such a contract is dependent upon the number of visits or the time consumed by the physician, or the time the patient survives, the reason for the holding does not apply and the consideration can be recovered from the estate of the patient, provided it is not fraudulent. All agreements must be interpreted in the light of public policy, which forbids that contracts shall receive such interpretation as will encourage crime or make their enforcement a reward therefor. Wager policies of insurance were held void at common law because of the obvious temptation presented by them to the commission of crime. *A physician should avoid a contract whose enforcement might appear to be a reward for violating the law.*

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[17] *In re* Succession of Mary Percival —— La., ——; 72 So., 467; L. R. A. 1917 A, 1264,—Note.

[18] Smith *v.* Hyde, 19 Vt., 54; Hupe *v.* Phelps, 3 Stark, 480; Mock *v.* Kelley, 3 Ala., 387.

[19] Keeler *v.* Clifford, 165 Ill., 544, 548.

[20] Dent *v.* Bennett, 4 M. & C., 269.

[21] Zeigler *v.* Illinois Trust & Savings Bank, 245 Ill., 180.

Frequency of Visits.—The physician must determine the frequency of calls required by the condition of his patient, and if the patient accepts such services he cannot escape liability for services actually rendered, on the ground that calls were more frequent than necessary, unless he can show fraud or other improper motive on the part of the practitioner.[22] Where the services are admitted, but an alleged special contract as to fee denied by the patient, the physician can recover at least what his services were reasonably worth.[23]

It has been suggested that the frequency of visits by a physician to his patient may depend to some extent on the general custom among physicians in similar localities in the treatment of similar cases, but not upon the custom of any particular physician in his own practice.[24]

Where the question is raised by the patient in a suit by the physician for his fee, for the purpose of reducing the same, there may be some merit in the suggestion of the influence of general custom as bearing upon the good faith of the physician in the number of calls he made, but if infrequency of visits is charged as a basis of action for malpractice the patient would be required to establish, by expert testimony, that the conduct of the physician, irrespective of custom, was, in fact, negligent, and resulted in damage to the patient.

Value of Services Is a Question of Fact.—Where he has no previous understanding with the patient, the amount to which the practitioner is entitled, is a question of fact for the jury, and is said to be what the services were reasonably worth, under the circumstances. In determining the value of the services the jury should take into consideration the time consumed, the delicacy and difficulty of the operation, the usual and customary fees for the same or similar services in the locality, and the success or failure of the efforts, where improper treatment is shown.[25]

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[22] Ebner *v.* McKay, 166 Ill., 297; Todd *v.* Myers, 40 Cal., 355.
[23] Henderson *v.* Hall, 87 Ark., 1.
[24] Tomer *vs.* Aiken, 126 Ia., 114; 101 N. W. 769.

What May Be Shown.—The practitioner may show the number of his visits or treatments, the time consumed, the distance traveled, the medicines and materials furnished. The implied agreement is to pay what the services are reasonably worth in the market, as it were, and all matters bearing upon that fact are admissible in evidence by either party.[26]

PREVIOUS CHARGES.—Charges for similar services previously rendered to the same patient are regarded as admissible, as presumably being in the minds of the parties at the time the services in question were rendered, and especially when offered on behalf of the patient.[27]

PROFESSIONAL STANDING.—A practitioner may show his high professional standing as affecting reasonable value of the services he performed.[28]

COMMUNICATION OF INFECTIOUS DISEASES.—In reduction or defeat of a fee the patient may show that the physician communicated to him, or his family, the smallpox while on the professional visits for which he is seeking to recover.[29]

BILL LESS THAN PRESENT CLAIM.—The fact that a practitioner in an action to recover the value of professional services, presented a bill for an amount less than he is suing for, is competent evidence on the question of the value of his services, as it is in the nature of an admission that the amount thereof is the fair and reasonable value of the same. Some courts hold that his right of recovery is limited to that sum, but others hold that, while his own estimate of the value of his services is evidence against him of a high character, it is by no means conclusive, and that he still has the right to show that his services were in fact worth more, and that the bill was rendered for a less amount by mistake, or for some other satisfactory reason.[30]

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[25] Adams *v.* Stevens, 26 Wend., 451; Smith *v.* Watson, 14 Vt., 332; Wheaton *v.* Johnson, 55 Ill., App. 53.

[26] Starrett *v.* Miley, 79 Ill. App., 658.

[27] Sidener *v.* Fetter, 19 Ind. App., 310.

[28] Lange *v.* Kearney, 51 Hun, 640; 127 N. Y., 676; Heintz *v.* Cooper, 47 Pac., 360; Morrell *v.* Lawrence, 203 Mo., 363.

[29] Piper *v.* Manifee, 12 B. Mon., (Ky.) 465.

What May Not Be Shown.—The reasonableness of a charge is not shown by testimony of what the practitioner charged another patient in a similar case.[31] The professional income of the physician can have no bearing on the value of his services, regardless of the issues.[32] The patient will not be permitted to show for what he could have procured other practitioners to render the services in question.[33] Neither can he show, in defense, the practitioner's bad character or bad reputation generally.[34] In such an action the personal character of the practitioner is not involved, and evidence on that subject is immaterial and cannot be introduced.[35]

FINANCIAL CIRCUMSTANCES OF PATIENT OR PHYSICIAN.—The pecuniary circumstances of the patient or practitioner are not an element in determining the value of the services, as the value whether considered as a benefit to the one, or a detriment to the other, cannot be affected by the ability of the obligor to pay, nor by the necessities of the obligee.[36]

The reason for holding (as some courts hold) that the financial standing of the patient may be shown is based upon the fact that there was evidence in the case showing that there was at the time and place of service a *general custom, known to the public,* among physicians and surgeons to graduate their fees according to the financial standing of their patients. But in any event the charges must be reasonable, whether considered from the viewpoint of benefit to the patient or detriment to the physician.[37] Aside from the charitable work bestowed by physicians, they are frequently called upon to render professional services to patients who are in no financial condition to pay a reasonable fee. The charge made by the physician under such circumstances does not necessarily import that the amount fixed is fair or reasonable. Owing to the penury of his patient, he may fix his fee at $10, when, in fact, he knows that $1000 would be fair, just and reasonable. The financial ability of the patient may be shown, if at all, in order to establish the fact that he is able to pay a reasonable fee. The physician cannot charge the rich more merely because he must charge the poor less. Whatever the charge, regardless of the financial standing of his patient, the physician must prove by competent evidence that it is *fair, just and reasonable.*[38]

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[30] Heath *v.* Kyles, 1 N. Y., Supp., 770; Williams *v.* Glenney, 16 N. Y., 389.

[31] Collins *v.* Fowler, 4 Atl., 647.

[32] Marion County *v.* Chambers, 75 Ind., 409; Thomas *v.* Caulkett, 57 Mich. 392.

[33] Marion Co. *v.* Chambers, 75 Ind., 409.

[34] Jeffries *v.* Harris, 10 N. C., 105.

[35] Jeffries *v.* Harris, 3 Hawks, 105.

[36] Wheaton *v.* Johnson, 55 Ill. App., 53; Cotnam *v.* Wisdom, 83 Ark., 601; Hess *v.* Lowrey, 122 Ind., 225; Robinson *v.* Campbell, 47 Ia., 625; Morrell *v.* Lawrence, 203 Mo., 363; Marrisett *v.* Wood, 123 Ala., 384; Apparently contra, Succession of Haly, 50 La. Ann., 840; Lange *v.* Kearney. 127 N. Y., 676.

License Presumed.—In an action for a fee, in the absence of any evidence, it will be presumed that the practitioner had a license in a State where a penalty attaches for practicing without a license.[39]

Unlicensed Practitioners.—An unlicensed practitioner cannot recover for his services in a State where the statutes in force at the time the services were rendered require a license, and epsecially if the statutes bar recovery or fix a penalty for practicing without a license.[40] Money paid to an unlicensed physician for services cannot be recovered by suit at law, and it has been held that the amount of a note, given under such circumstances, may be recovered by a *bona fide* holder for value, notwithstanding the provisions of a statute prohibiting the practice of medicine without a license and fixing a penalty for its violation.[41]

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[37] Morrell *v.* Lawrence, 203 Mo., 363; 11 A. C., 655.

[38] Lombard *v.* Bayard, 15 Fed. Cas., 8469; 9 How., 530. Stevens *v.* Ellsworth, 95 Ia., 231, at 241.

[39] Good *v.* Lascher, 99 Ill. App., 653; Williams *v.* People, 20 Ill. App., 92.

[40] Patrick *v.* Perryman, 52 Ill. App., 514; Chicago *v.* Honey, 10 Ill. App., 535; Warren *v.* Saxby, 12 Vt., 146; Oscanyan *v.* Winchester Co., 103 U. S., 261; Harrison *v.* Jones, 80 Ala., 412; Orr *v.* Meek, 111 Ind., 40.

Nature of Remedies Must be Disclosed if Sought.—In an action for his fee, wherein the patient defends on the ground that the services were useless by reason of the fault of the physician and the worthlessness of the medicines, the physician may be required to disclose the nature of the remedies used by him, even though he claims a secret formula, and the patient may show that such remedies have no efficacy towards the result sought to be attained, or that they are, in fact, injurious when so used.[42]

What Physician Must Prove.—A physician must establish the contract of employment, that he rendered the services in question and, where there was no agreement as to fee, that they were of the value claimed.[43]

HOW PROVEN.—The usual and customary fee for like services, and the reasonableness of the charges made, must be shown by the testimony of other practitioners.[44] In such cases the testimony of the witness is ordinary in so far as it goes to the usual and customary fee,[45] and opinion evidence, in so far as it assumes to state what is a reasonable fee, or what is the reasonable value of the services.[46]

EFFECT OF OPINIONS.—These opinions as to reasonableness of a fee and value of services, while not binding on the court and jury must not be disregarded, and a value fixed by them upon their judgment, based upon their own observation and experience.[47]

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[41] Citizens State Bank *v.* Nore, 67 Neb., 69.

[42] Jones *v.* King, 81 Ala., 285.

[43] Styles *v.* Tyler, 64 Conn., 432; Robinson *v.* Campbell, 47 Ia., 625.

[44] Chicago *v.* Wood, 24 Ill. App., 40; Wood *v.* Ohio R. Co., 53 S. C., 10; MacEvitt *v.* Maass, 72 N. Y. Supp., 158.

[45] Walker *v.* Cook, 33 Ill. App., 561–3.

[46] Marion Co. *v.* Chambers, 75 Ind., 409; MacEvitt *v.* Maass, 72 N. Y. Supp., 158.

[47] *In re* Smith, 41 N. Y. Supp., 1093; Ladd *v.* Witte, 116 Wis., 35; Wood *v.* Baker, 49 Mich., 295; Spalding *v.* Bliss, 83 Mich., 311.

Husband and Wife; Parent and Child; Guardian and Ward.—NECESSARIES.—A husband is liable for necesssaries furnished his wife. This liability attaches even though they are supplied her over his objection, when he fails or refuses to provide the same. Under the law a minor is liable for necessaries furnished him to the extent of their reasonable value at the time. A special contract with the minor relative to the consideration is disregarded. The estate of an insane person is liable to the party who supplies him with necessaries.

The question of what are necessaries has often been adjudicated by the courts. Like most cases coming before the courts, the answer is not always self-evident. A necessity to one might be a luxury to another, while a luxury today may be a necessity tomorrow. With reference to husband and wife necessaries embrace the usual provisions for maintenance of the wife's health and comfort appropriate to their mode of life, in view of their social standing and station, and his financial ability.[48]

MEDICAL SERVICES ARE NECESSARIES.—As a general proposition, the estate of any person under legal disability, for any cause, will be liable for medical and surgical attention and services reasonably necessary for the health, comfort, convenience or appearance of the patient, and the measure of the liability is the fair, reasonable value of the services and materials at the time and place.[49]

HUSBAND SELECTS PHYSICIAN.—Ordinarily the husband has the right to select the physician who performs work for the wife, and it is the wife's duty to go where the husband determines. Therefore, if a husband specifically objects to a certain practitioner and provides for his wife a reasonably competent person to do the work for her, the physician objected to cannot, with knowledge thereof, render the services and hold the husband liable therefor. In such case he could look alone to the wife, and should make a contract, or special agreement, with her to that effect. The same rule applies to guardian and ward and similar relations.

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[48] McMahon *v.* Sankey, 133 Ill., 636; Clark *v.* Tenneson, 146 Wis., 65. Page 104

[49] McCreery & Co., *v.* Martin, 84 N. J. L., 626, 47 L. R. A., 279.

FAMILY EXPENSE.—Medical treatment for husband or wife, or any minor member of the family, are reasonably within the intent of those statutes which make both husband and wife liable for family expenses.[50]

Parent and Child.—At common law the liability of a father for the support, maintenance and education of his minor child, while recognized, was not well defined and amounted to little more than an imperfect, unenforcible obligation. The duty was always conceded, but the manner of its discharge was exclusively within the discretion of the parent. The party who voluntarily supplied the wants of a minor had no legal claims against the parent, and all that he did in this respect was at his own risk, unless he had the express promise of the father to remunerate him, or the circumstances were such that a promise of that character would reasonably be implied. In the absence of special legislation, this obligation remains the same as at common law, and the general rule prevails that where a person furnishes necessaries to a minor without authority from the parent, he does so at his peril and, in order to recover from the parent, he must show by a preponderance of the evidence, either an express authority or circumstances from which such authority may be implied. The parent is to be the judge of the wants of his child and of his ability to supply them, and the extent to which he shall respond to this obligation, and, when no express authority has been given to the child to bind the parent, it devolves upon the party supplying such necessities to show the neglect or refusal of the parent to provide the same. A parent, by express or implied agreement, may emancipate a minor child, thereby relinquishing control and authority over him, conferring upon him the right to his own earnings and terminating the legal duty of the parent to support the child. Where there is complete emancipation, the physician should have the express promise of the parent if he expects to look to him for his fee.[51]

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[50] L. R. A. 1917 F, 860.

Child Special Agent of Parent.—If the child has authority to bind the parent it is usually in the nature of a special agency, and the party dealing with the minor is bound to know the extent of that authority.[52]

Liability of Mother.—In States where married women have complete control of their separate estate, a mother may bind herself to pay for medical attention and services rendered to her minor children, notwithstanding the father is living and able to pay.

Ratification.—Where, without the knowledge of the parent, a physician prescribes for a minor by giving him a prescription or medicine, and the parent, with knowledge of the facts, or of such facts as to put him in inquiry, permits the prescription to be compounded and the medicine to be taken, he is considered in law as having ratified the act of the child in engaging the physician and will be held liable for the reasonable value of the services.

Malpractice.—The evidence that will sustain an action against a physician for malpractice will be sufficient to defeat his recovery in an action for compensation in such case. In fact less negligence is necessary to defeat a right to compensation than is requisite to sustain an action of malpractice for the injury.[53] If the services of the physician were of no value, and if the remedies used in the treatment of the patient were worthless and possessed no efficacy in producing a cure, and these facts were known to the practitioner or ought to have been known to him, at the time of the treatment, no recovery can be had for the services.[54]

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[51] Wallace *v.* Cox, (Tenn.) L. R. A. 1917 B, 690.

[52] Dumser *v.* Underwood, 68 Ill. App., 121.

[53] Mixon *v.* Phelps, 29 Vt., 198; Loan etc., *v.* Friedley, 133 Ind., 143; Hill *v.* Featherstoneaugh, 8 Bing., (Eng.) 572.

[54] Logan *v.* Field, 75 Mo. App., 594, 603.

Malpractice as a Defense to an Action for Services.—Malpractice by a physician resulting in injury to his patient may be pleaded by the patient as a defense to an action by the physician for the value of his services or for an agreed fee, or to recoup his damages.[55]

Effect of Judgment for Fees—The courts are not agreed as to the effect of a judgment for the services in barring a subsequent action for malpractice, in reference to the same services. Some courts distinguish between cases where the suit for the fee is defended and cases where the judgment is by default.[56]

Consultant.—In the absence of an agreement to the contrary, a patient is liable to a consulting physician for the reasonable value of his services, even though as between the patient and attending physician, the latter agreed to assume the bills,[57] or as between the physicians, the one in attendance on the case guaranteed the consultant his usual fees.[58] Where the patient is unconscious or insane and knows nothing of the conference or consultation, and never regains consciousness or sanity, his estate will be liable for the services of those who are called into the conference by the attending physician, presuming all acted in good faith.

Witness Fees.—A witness, subpœnaed to appear and testify in a civil case, is entitled to compensation, to be determined by the number of day's attendance and the distance necessarily traveled in going to and returning from court. The law does not recognize difference in the earning capacity of witnesses. The professional or business man is entitled to no more than the most unskilled laborer out of employment.

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[55] McLure *v.* Hart, 19 Ark., 119; Howell *v.* Goodrich, 69 Ill., 556; Hyles *v.* Tyler, 64 Conn., 432; McKleroy *v.* Sewell, 73 Ga., 657; Holmes *v.* McKennan, 120 Ill. App., 320.

[56] Jordahl *v.* Berry, 72 Minn. 119; 45 L. R. A., (O. S.) 541—note; Barton *v.* Southwick, 258 Ill., 515.

[57] Shelton *v.* Johnson, 40 Ia., 84.

[58] Garry *v.* Stadler, 67 Wis., 512.

Expert Witness Fees.—"There is a distinction between the case of a man who sees or hears a fact and is called to prove it in a court of justice and the case of a man who is selected by a party to give his opinion on a matter with which he is particularly conversant from the nature of his study, experience or employment in life. The former is bound, as a matter of public duty, to testify to a fact which happens to have fallen within his knowledge. Without such testimony the course of justice must be stopped. The latter, however, is under no such obligation. There is no such necessity for his evidence and the party who selects him must pay him."[59] However, in most States the courts hold squarely that an expert who knows nothing whatever of the facts in a case may be subpœnaed and required to give his opinion on a hypothetical question without any compensation other than the usual witness fee, and he cannot refuse to testify when interrogated as an expert only, upon the ground that no compensation greater than that allowed ordinary witnesses has been paid or promised to him.[60] "It is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty, should refuse to testify in a case pending before the courts of his country, involving the life or liberty of a fellow being and the rightful administration of the laws of a common country."[61] The court has the right to compel a physician to give expert testimony in answer to a hypothetical question calling for his opinion in suits between individuals, and is not confined to criminal prosecutions, since in either case the object is to promote public justice and insure the peace and good order of society. Refusal of a physician, who has been regularly subpœnaed and placed upon the witness stand to answer a hypothetical question calling for his opinion, for the reason that special compensation has not been paid or assured to him, justifies the trial court in fining him for contempt.[62] By a divided court a different conclusion was reached in Indiana.[63]

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[59] Maule, J., *in* Webb *v.* Page, 1 C. & K., 23.

[60] Philler *v.* Waukesha Co., 139 Wis., 211; Dixon *v.* People, 168 Ill., 179, 186.

[61] Summers *v.* City, 5 Tex. App., 365.

SPECIAL PREPARATION.—Courts will not require a physician to make a special preparation in order to qualify himself as a witness in a case; hence, he cannot be punished for a contempt for refusing to make a post-mortem examination, unless paid therefor, nor can he be required to prepare himself in advance for testifying in court by making an examination or performing an operation or resorting to a certain amount of study, without being paid therefor.[64]

WHEN NOT SUBPŒNAED.—If no subpœna is served upon an expert and he attends as a witness under a specific agreement for special compensation made with the party calling him and not in pursuance of the process of the court, he may be enabled to enforce such an agreement in court and compel payment for his services in accordance with the terms theroef, as a condition of his being sworn as a witness.[65]

EXTRA FEES FOR EXTRA SERVICES.—If a physician, at the request of a party to a suit, performs extra services, such as assisting the attorney in the medical features of the case, it is entirely proper and legal for him to receive pay therefor, and to make an agreement whereby he is to receive such payment.[66] If he testifies without an express agreement as to the amount of his compensation, he cannot afterwards recover more than the statutory fee.[67]

POST-MORTEM FOR CORONER.—Where there is no law making the county liable for services of a physician employed by the coroner of the county to make an examination of a dead body and hold a post-mortem thereon for the purpose of enabling him to give expert testimony at an inquest, the physician must look to the coroner for his compensation, and unless a previous arrangement was made with the coroner as to the amount of his fee he doubtless would be entitled only to the usual witness fee and the reasonable value of his services in performing the autopsy.[68]

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[62] *Ex parte* Dement, 53 Ala., 389; Dixon *v.* People, 168 Ill., 179.
[63] Buchman *v.* State, 59 Ind., 10.
[64] Dixon *v.* People, 168 Ill., 179.
[65] Walker *v.* Cook, 33 Ill. App., 561, 565.
[66] Lewis *v.* Blye, 79 Ill. App., 256.
[67] *Ex parte* Dement, 53 Ala., 389; Sumner *v.* State, 5 Tex. App., 365.

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[68] Piatt *v.* Knott, 99 Ill. App., 420.

CHAPTER X

AGREEMENT FOR SURGICAL OPERATION

Essentials.—*The question of right to operate is purely one of contract, and we must look to that subject for the principles to be applied. Whatever right or authority the surgeon has in the premises he derives by agreement, express and implied, with his patient.*

Implied Stipulations.—Express executory agreements seldom contain everything which was in the contemplation of the parties at the time. Some terms may be unexpressed because considered self-evident. Some elements may be omitted by oversight. What is implied in an express executory contract is as much a part of the agreement as what is expressed.[1] The rule of reason is inherent in mental processes and must always be applied in human transactions.[2] To the express stipulations of an executory contract the law ingrafts,—

(1) Those elements which are essential to complete the contract as the parties must have intended it, and which (a) are reasonable and necessary inferences from the express stipulations and the circumstances, or (b) were reasonably in the minds of the parties at the time, and

(2) Those elements which, although not manifestly in the contemplation of the parties at the time, are essential (a) to a rational execution of the agreement, or (b) to the attainment of the general purposes of the agreement.[3]

Nature of Agreement.—Usually the express stipulations for a surgical operation are very meagre and are clothed in the most general terms. Often the essential features are not discussed. Details are almost never referred to. We must look to the purpose of the operation and the other circumstances to find, by inference, the terms of the agreement. Where the facts are not disputed and only one conclusion can be reasonably drawn therefrom, such inference may be a conclusive presumption of fact and, therefore, become a part of the contract, as a matter of law; that is, where the only reasonable inference from the facts and circumstances is in favor of the exercise by the surgeon of certain authority, such authority should be considered as being within the purview of the original contract of employment, as a matter of law. Where the only reasonable inference from the stipulations and the circumstances negatives the right of the operator to exercise a certain discretion, the exercise of such right by the operator should be considered, as a matter of law, to be no part of the contract. However, if the legitimate inference to be drawn from the stipulations and the circumstances would either affirm or deny the right to perform a certain act, then the question of the authority of the operator to perform such act should be left to the jury to be determined as a matter of fact; in other words, where reasonable men, uninfluenced by ulterior motives, might arrive at different conclusions as to the authority for the act, under the stipulations and the circumstances, then the question of authority should be left to the jury as one of fact.

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[1] Hart *v.* Otis, 41 Ill. App., 431, 432.

[2] Holy Trinity Church *v.* United States, 143 U. S., 457.

[3] *See* Hadley *v.* Baxendale, 8 C. L. R., 517.

Consent Necessary.—*Consent of the patient is indispensable to the justification of a surgical operation. It is an absolute right of the patient to determine what he wants done, and his will must prevail. Without consent, an operation is a trespass,*[4] *however skillfully performed.*

CONSENT MAY BE IMPLIED.—Knowingly submitting to a particular operation or course of treatment, by an adult, implies consent thereto. Where a patient, without objection, voluntarily submits to an operation, or a course of treatment, his specific consent will be presumed as such conduct is *prima facie* evidence of his consenting mind.[5] *When a person has selected a surgeon to operate upon him, and has appointed no other person to represent him during the period of unconsciousness which constitutes a part of such operation, the law casts upon the operator the responsibility of so acting, in good faith, in the interest of his patient, within the reasonable scope of his employment and the general purpose of the relief sought, that the latter shall receive the fullest benefit of that professional judgment and skill to which he is legally entitled.*[6]

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[4] Pratt *v.* Davis, 224 Ill., 300 *see* 50 L. R. A., 880.

Whose Consent.—In case of an adult, not under mental disability, his consent alone is sufficient to justify a practitioner in performing any reasonable operation within the scope of his professional employment.

Husband and Wife.—A married woman in complete possession of her faculties has full power, without the consent of her husband, to submit to a surgical operation upon herself, and where she is fully advised as to the operation, the surgeon may misrepresent the nature thereof to the husband in order to get his consent.[7]

Parent and Child.—Consent of the parent is usually necessary to authorize work of a radical nature on a minor who has not arrived at the age of mature discretion. A person standing in the relation of a parent would be qualified to authorize the services and relieve the practitioner of a charge of trespass for performing the operation. When the minor resides with his parents, an adult sister could not be said to stand in *loco parentis* and, therefore, her consent would not be sufficient authority.[8] In the case last cited, the patient was a minor about ten years of age. While on a visit with an adult sister, she was taken by the sister to the surgeon for examination for adenoids. After examination, the surgeon recommended an operation to which the adult sister consented, and the child acquiesced therein. The operation was reasonably necessary, but not emergent, and the father was in easy access. The child died under the influence of the anesthetic without any fault on the part of the operator.

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[5] State *v.* Housekeeper, 70 Md., 162.

[6] Brennan *v.* Parsonett, 83 N. J. L., 20; 83 Atl., 948.

[7] Burroughs *v.* Crichton, 4 ALR, 1529.

[8] Rishworth *v.* Moss., (Tex.); 159 S. W., 122; 191 S. W. 843; 222 S. W. 225.

It has been held that failure to get the express consent of the father before administering a general anesthetic to a youth 17 years old who, in company with adult relatives, applied to a surgeon to be relieved of a small tumor on the ear, will not render the surgeon liable to the father for the death of the boy while under its influence, where it appears that the son left the home of the father for the express purpose of consulting a specialist about his affliction, returned to the home to await the report of an analysis, and thereafter again went to the office of the surgeon with adult relatives to get the surgeon's final report and recommendation, and gave his consent to the administration of an anesthetic and the performance of the operation. Here consent may reasonably be implied; the father apparently gave the boy authority to consent for him.[9]

EMERGENCY.—Where, by accident or other fortuitous circumstances, a minor sustains an injury necessitating operation without delay, his consent would be sufficient on the ground that it was necessary, and if he were rendered unconscious, the consent of the absent parent or guardian would be implied. The same rule would apply under said circumstances if the injured party is an infant too young to exercise any judgment in the premises. If the parent is present and forbids the operation, or refuses to consent thereto, better not operate, but let the blame rest on the party who assumed the responsibility. However, action by the surgeon under such circumstances might be justified, and the condition or situation would probably be a defense against any action which might be brought.[10]

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[9] Baker *v.* Welsh, 144 Mich., 632.

[10] Cotnam *v.* Wisdom, 83 Ark., 601; Sceva *v.* True, 53 N. H., 627.

Surgeon's Discretion.—The surgeon cannot go beyond the authority given him by the patient. To this proposition there can be no exception. The difficulty lies in determining the extent of his authority. Generally it must be inferred in great measure from the circumstances. Not his wish, but the patient's welfare must control when stipulations do not cover the point; but even his notion of the patient's welfare must give way to the expressed wish of the latter. *Where the patient has decided, there is no occasion for the exercise of the surgeon's discretion.* He is bound by his patient's conclusion. Where there is an express stipulation there cannot be an implied one inconsistent therewith. Where a specific operation has been agreed upon and the attending circumstances are such as to negative the idea of an intention on the part of the patient to lodge a discretion in the operator, any departure from the specified operation by the latter, would be a trespass, for which he may be required to respond in damages. What was fairly within the mind of the patient? That was implied. What does the welfare of the patient require? In the absence of inconsistent stipulations, the patient will be presumed to have intended and authorized what was for his best welfare. Anything which, within the discretion of the practitioner, was reasonably necessary to accomplish the general purpose of the operation, will also be presumed to have been intended by the patient.

Motive.—*An unauthorized operation is a trespass regardless of the motive which prompted the operator.* The basis of the liability is the wrongful invasion of the person, and proper motive is neither justification nor excuse for the assault. The only relation of *motive* to the *offense* is its effect on the *damages* to be recovered. Where the motive was good and the act performed was free from negligence, the law allows only compensatory damages, but never less than nominal, while in a case involving evil motive or reckless disregard of the wishes of the patient, the injured party may recover punitive damages in addition to his actual loss.

Presumptions.—(a) FROM CONSENT AND CIRCUMSTANCES. —Mere consent to an operation does not extend the agreement beyond the reasonable limits of the specific relief stipulated at the time the patient goes under the influence of the drug. An agreement with reference to the performance of an operation does not imply consent to an entirely different or more extensive invasion of the body. In fact, under the doctrine that the specification of one is the exclusion of others, the right to perform a distinctly different operation would apparently be specifically prohibited. The mere employment of a surgeon to perform an operation does not give him implied authority to do whatever, in his discretion, he may deem necessary or expedient without consulting the wishes of his patient. Great though his responsibilities are, they do ont confer upon him unlimited, arbitrary and absolute power to treat his patient in accordance with his own judgment without reference to the wishes of the latter.

Surgical operations cannot be performed as you erect a house, build a city, or construct a machine,—according to plans and specifications. Plans and procedure must be varied to meet emergencies. The welfare of the patient demands that the operator shall have implied power to deal with unforeseen incidents and unexpected conditions as they arise in the progress of the stipulated operation, in such manner as he shall consider proper, and a reasonable departure from the exact purpose and scope of the original operation, for the benefit of the patient, ought not and, as a matter of law, does not make the operator liable for malpractice.[11]

(b) FROM SURGEON'S DUTY.—The implication of authority must necessarily be as great as the implication of the responsibility of the surgeon in the premises. In fact there should be some latitude for the exercise of the operator's discretion and, doubtless, such right must have been contemplated by the parties. The implied consent of the patient must be broader than the operator's duty, for there must be a field within which the latter may use his discretion. There can be no duty on the part of the surgeon without an implication of consent in reference thereto on the part of the patient.

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[11] Pratt *v.* Davis, 224 Ill., 300, 309.

Controlling Facts.—When a person agrees in general terms, with a surgeon, for an operation for specific relief and, in pursuance thereof, takes a general anesthetic without giving any special instructions to the operator, he impliedly gives the latter authority to do any act reasonably necessary to accomplish the general purpose of his specific employment, or clearly incident thereto, and, in his discretion, to depart from the specific operation originally contemplated, so far as to give the patient the fullest measure of benefit from his skill, judgment and observation, within the purview of the relief sought. Thus, in the Mohr case, *infra,* if the general employment had been *to relieve the patient of defective hearing,* and *had such relief been the specific purpose of the operation agreed upon,* the mere fact that the surgeon made a wrong operative diagnosis resulting in recommending an operation on the wrong ear, should not have limited his authority to an operation on the ear mentioned, because the patient was entitled to have the benefit of his skill and best judgment at all times. Neither party should be bound by the mistake. On the other hand, if the relative conditions of the ears changed between the examination and the operation, the surgeon should be considered as having the implied authority to deal with conditions as he found them at the time, keeping in view the general purpose of his employment—*to relieve defective hearing.*

Emergency.—The surgeon is sometimes confronted with an emergency requiring immediate operation, under circumstances where express consent is impossible, as in case where a party is unconscious from an injury, and where no one is present who, in law, might be presumed to have authority to speak for him. In such case the consent of the patient, if an adult, or of the parent, if the patient is a minor, is presumed. Here the constructive consent, presumed by law from the necessity of the situation, goes only to the performance of the usual and ordinary operation to relieve the particular injury and meet the emergency, and no farther, and, therefore, would not include an operation for some chronic ailment with which the injured party was suffering at the time, unless the same were practically necessary to the skillful performance of or recovery from the traumatic operation. Thus, an injury necessitating entering the abdominal cavity for proper treatment and relief, would excuse the operator for so doing and, in case the patient is unconscious and the necessity of operation imperative, consent therefor will be presumed, *ex necessitate;* but the circumstances would not carry therewith authority to remove a diseased ovary, an inflamed appendix, a calcified gall bladder, a tumor or other chronic affliction, unless such organ was involved in the injury, or such operation were reasonably necessary to a successful recovery from the emergent operation.[12]

More Than One Method Affecting the Patient Differently.—Where either of two or more courses may with equal propriety be pursued, but affecting the patient differently, the surgeon should counsel and recommend to the patient what should be done, and how, but should finally adopt the method selected by the patient. If the latter refers the question back to the operator he should follow the course which in his best judgment is preferable, under all the circumstances, and will be liable in damages only in case of negligence, even though another practitioner would have recommended a different course.

Patient's Conclusion Paramount.—*It is for the practitioner to examine, consider and recommend; it is for the patient to decide.* His final determination must be respected even though it be clearly wrong. The only alternative to obeying that conclusion, when expressed, is to refuse to operate at all and discharge the patient, that is, withdraw from the case. Usually the patient will accept and follow the advice of his surgeon, given in good faith after proper diagnosis and consideration; but when he will not do so, his wishes must control in all operations undertaken. Merely because the practitioner's judgment ought to be better than the judgment of his patient is not sufficient reason why the judgment of the former should prevail. This applies with special force where major operations are involved.

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[12] Cotnam *v.* Wisdom, 83 Ark., 601; 12 L. R. A., 1090.

Operating at Patient's Request.—A surgeon, however, is not always justified in performing a surgical operation merely because the patient requests it. Still, having in good faith given proper advice, which the patient refuses to adopt, the surgeon will not be liable in damages for doing, in a proper manner, what he was requested to do, provided always (a) that the patient was, in law, competent, at the time, to determine for himself, (b) that the character of the operation was not such as to negative the idea of good faith and proper consideration for the welfare of the patient and (c) that the operation was not prohibited by law.

Good Faith of Operator.—The surgeon is bound to exercise the utmost good faith and fair dealing towards his patient in respect to the operation to be performed and any material deception will convert his efforts into an assault justifying punitive damages, regardless of his real motives. He dare not falsely pretend that only a slight operation is necessary and contemplated and then, after his patient is under the influence of an anesthetic, perform a more extensive and serious operation.[13]

Departure from Agreed Operation.—Without the consent of his patient, a surgeon may not materially and radically depart from the operation originally stipulated. This question does not arise in cases where the surgeon, during the progress of the operation, discovers unexpected conditions necessitating a greater invasion of the body and the removal of more tissue than at first contemplated. In such case he performs the operation specified but is required to do more than originally supposed. Perhaps he intended to amputate a limb just above the knee, but finds that he can save only a few inches of femur. Perhaps he operates for a tumor and in addition removes several smaller offenders; or in excising a gall bladder he discovers and closes a perforation in the stomach. These are fairly within the purview of the agreed undertaking; but an agreement to operate on the right ear may not be an agreement to operate on the left instead, even though for the same cause. Consent to close a hernia on the left side of the abdomen may not imply the right to substitute therefor an operation on the right groin, although the latter is more imperatively needed. Consent to curettage could scarcely be regarded as including permission to remove the uterus and corelated organs.

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[13] Pratt *v.* Davis, 224 Ill., 300.

Question of Fact.—What will constitute a departure may be a question of fact.[14] It is impossible to lay down any strict rule for determining what constitutes an improper departure from the specific agreement between patient and operator, since each case must depend upon its own special facts. Whether there was such a substantial departure from the scope and purpose of his employment as to negative the idea of consent must be determined from a consideration of all the circumstances in the case, including the general purpose of the employment, the character of the operation specified and of the one actually performed, their relation to the relief sought, the exigency of the situation, the general welfare of the patient and the good faith and fair dealing of the operator.

Surgeon, Agent for Patient.—The suggested fiction that the surgeon becomes the agent of the patient under an anesthetic only complicates matters, since the same questions arise in determining his authority as agent, and must be answered on the same state of facts.

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[14] Mohr *v.* Williams, 95 Minn., 261; Rolater *v.* Strain, 39 Okl., 572, 137 Pac., 96.

Prohibited Act, or Operation.—*In no event is the operator justified in performing an operation or in doing anything which the patient has expressly forbidden. Even though he may consider that the health and welfare of the patient demand immediate operation, he has no right to disregard the prohibition of the latter.*

About sixty days after stepping on a nail, a patient, still suffering from an inflamed and open wound at the first joint of the great toe on her right foot, consulted a surgeon with reference to an operation. He advised her that an operation was necessary to effect a cure, and that the operation would consist in making an incision in the foot or toe so as to drain the joint and remove any foreign matter that might be found therein. The patient agreed to such operaion. She was taken to a hospital and an anesthetic administered, and the operation performed. In performing the operation a sesamoid bone was removed, and the cause of the action was based on this removal. There was no claim that the operation was unskillfully performed, but the patient alleged that she consented to the operation upon the express condition that no bone should be removed from her foot, and that by reason of the romoval the foot had been permanently injured and she had suffered great pain and distress of body and mind. The surgeon claimed that he was employed as her physician to drain the wound; that in compliance with said employment he made an incision into the toe; that before reaching the joint, so as to drain the same, he found it covered with a sesamoid bone which rendered it impossible to drain the joint without the removal of said bone; that said bone was in an unusual place on the side of the toe and its presence could not be ascertained by an examination; that had the bone not been removed and the joint properly drained, serious results would thave followed; that the removal was necessary to effect a cure; that said bone is not considered one of the bones of the human anatomy and was not within the contemplation of the parties at the time the surgeon consented to operate. The issues were submitted to a jury which found for the plaintiff and gave her $1000 damages, on which judgment was rendered. The court held,—

(a) That the surgeon had no authority to remove a sesamoid bone from the patient's foot without her consent, either express or implied.

(b) That she did not expressly consent, and whether or not her consent was implied, from the circumstances, was a question of fact for the jury to determine under all the evidence.

(c) That the inhibition to remove any bone from her foot might, as a matter of fact, include a sesamoid bone, even though such bones are not usually contemplated by surgeons when speaking of the bones of the body.

(d) That if the patient did not consent, the removal of the sesamoid bone was wrongful and unlawful and constituted in law a trespass upon her person and a technical assault and battery.[15]

In a certain English case,[16] a young lady consulted an eminent surgeon relative to some ovarian trouble, and before consenting to an operation told him that if he found only one ovary diseased he should remove it, but if both were involved he must not remove either. To this express inhibition the surgeon claims to have replied: "You must leave that to me." The patient claims that she did not hear such remark. Upon opening up the cavity both organs were found to be badly diseased and the surgeon removed them. The patient brought action for damages for operating in violation of instructions. There was evidence to the effect that her health and, possibly, her life required the excision of the organs. There was no claim of unskillfulness or carelessness. The court instructed the jury to find for the surgeon; thus holding, as a matter of law, that the patient had consented. Such holding is clearly wrong, as the jury should have passed upon the question as to whether, under the circumstances, the plaintiff did in fact leave the entire matter to the discretion of the surgeon. In view of her express prohibition, if she did not hear his alleged reply, and if she did not withdraw her instructions, he was a trespasser *ab initio,* whatever may have been his motives and regardless of what he thought her health and welfare required.

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[15] Rolater *v.* Strain, 39 Okl., 572, 137 Pac., 96.

[16] Baty *v.* Cullingworth, decided in London in 1896.

In an action for assault and battery, brought against a surgeon by a patient the facts were as follows: The patient had been operated upon a couple of years before for a rupture on the left side, and it was causing him some trouble. He consulted with the surgeon with reference to the same and, apparently, the surgeon's diagnosis was limited to an examination of the specific rupture. The defendant advised an operation but it appears that while such operation was advisable it was not imperative. After the anesthetic had been administered the surgeon discovered on the right side a hernia which was a serious menace to the patient, and of a character to cause his death should strangulation occur, and operated for the latter trouble without first procuring the patient's consent. The trial court correctly stated the law, to the effect that the patient must be the final arbiter to decide whether or not he will take the chances of an operation, and that his consent, express or implied, must be given before a surgeon can lawfully operate; but the court held that the consent to operate for one hernia, under the circumstances, was not, as a matter of law, an implied consent to operate for the other and left the question of consent to the jury, as one of fact. The jury found that the patient did not consent and rendered a verdict of $1000 against the surgeon. On appeal, the upper court ostensibly rejecting this rule as being unsuited to modern operations, held that under the circumstances consent was reasonably implied.[17]

In a widely quoted case, the patient was taken by her family physician to a specialist for examination of her hearing. After examining both ears the expert decided an operation on the right ear was necessary. Later, the patient submitted to an operation for that purpose, and after she was under the influence of a general anesthetic and the surgeon examined the right ear, he found that such operation was not imperative at that time, but, upon examination of the left ear, he found it in such condition as to demand immediate attention. Without waiting for the patient to recover from the anesthetic and getting her consent, he abandoned the operation on the right ear and operated on the left. It may be inferred from the opinion that the operation was upon the middle ear, through the drum, from the outside. The operation originally contemplated would apparently have required a similar invasion of the body on the right side of the head. After leaving the hospital the patient brought an action for assault and battery against the surgeon. She was successful before the jury and obtained a verdict for $14,322.50. The defendant moved for a new trial and also for judgment against the plaintiff dismissing the suit, notwithstanding the verdict, on the grounds (a) that the patient's consent was not necessary; (b) that the patient did, in fact, consent to the operation as performed; and (c) that the consent of the patient was implied under the circumstances. The motion for a new trial was allowed on the ground that the verdict was excessive, and the plaintiff appealed therefrom, but the motion to dismiss the suit was denied and the defendant appealed from that part of the order. The court found that the operation was successfully and skillfully performed, and was of a generally beneficial nature to the patient. There was no bad faith shown on the part of the operator.

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[17] Brennan *v.* Parsonett, 83 N. J. L., 20, 83 Atl., 948.

This case appears to be quite generally misunderstood. The opinion shows a thorough consideration of the subject by the court and is in perfect consonance with the rights of all parties concerned, though it is barely possible that the defendant's motion to dismiss should have been sustained on the ground that the consent of the patient was implied.[18]

Damages for Unauthorized Operation.—In determining the amount of damage for an operation beyond the purpose and scope authorized, the jury should take into consideration the character of the injury inflicted, the good faith of the operator, the reasonableness of what he did, in view of the general purpose of his employment, the nature and exigency of the malady which was the subject of the engagement and of the disorder actually treated, and the beneficial nature of the operation performed.[19] Even though the services were actually beneficial to the patient, still he should recover nominal damages for the technical trespass, and the operator cannot recover a fee for his services in that behalf.

Unauthorized autopsy.—The consent of the next of kin is necessary to justify an autopsy. Without such consent the proceeding, however honest and disinterested the purpose or motive of the operator, is a trespass. The elements of trespass in law characterize the act, and the guilty party must suffer the penalty. While in a proper case a coroner, at his own option, may hold or order an autopsy, a lay physician, even though he be the family or attending physician, cannot perform a post-mortem without the consent of the next of kin. The attending physician may be required by law to issue a certificate stating, if possible, the cause of death, and without a post-mortem he may not know. Still he dare not obtain his information by that means without first securing approval from a responsible member of the family. No convenience or curiosity or desire on his part can be substituted for the permission of those who are interested in the body.[20]

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[18] Mohr *v.* Williams, 95 Minn., 261.
[19] Mohr *v.* Williams, 95 Minn., 261.

In suits for damages for performing an autopsy without authority, the damages are usually confined to injury to feelings and to mental distress of plaintiff.

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[20] Wood *v.* Graham, 140 Minn. 16; 167 N. W., 113.

CHAPTER XI

RES IPSA LOQUITUR

The Maxim.—The maxim, *res ipsa loquitur,* is a well recognized principle in the law of evidence as applied to negligence cases. Literally translated, the expression means *the thing itself speaks, or the thing speaks for itself.*

Basis of the Maxim.—Like most rules of evidence it has its basis in the nature of our mental processes. Thanks to our faculty of reason, our knowledge is not confined to information which comes to us through the senses. We early learn the relation of cause and effect, and that certain *causes* always (or usually or sometimes) produce certain *effects,* so that when either is brought to the mental consciousness through the senses the other is deduced by a mental process which, where the relation always exists, becomes so natural as to be almost, if not entirely, without conscious effort. The man who passes through a tropical hurricane, when it is over, admittedly has, by memory, the observation of his senses at the time of the fact of such an event and knows as a matter of memory of *causes* and *effects* that such disturbance of the elements occurred. The man who views the devastated forests, the raging torrents and the spreading floods, with their usual concomitants, by a simple process of reasoning, based upon past experiences, knows that nature has experienced one of her periodic convulsions and thereafter, the event to him becomes a memory of *effects.* In our mental processes we go so readily from cause to effect and *vice versa,* as often to confuse them in thought and speech. Our minds are so constituted that any given fact presupposes other facts in corelation therewith, both prior and subsequent thereto. Every effect is the result of some prior cause, and in its turn becomes the cause of some subsequent effect.

When, in the universal experience of mankind, a certain familiar effect has but one known cause, the presence of the effect is a conclusive demonstration of the existence of the prior cause, even though the specific effect does not always result from the given cause. Thus, the fact that a woman is pregnant is unanswerable proof of prior sexual intercourse, and hence, of sexual contact with some man,[1] even though such contact does not always result in pregnancy.

Presumptions.—*A presumption is hypothetical or inductive inference; something that is supposed to be true upon grounds of probability.* Presumption is an inference as to the existence of a fact from the existence of some other fact or facts based upon previous experience of that connection, implying relation or association, or dictated by the policy of administrative law. Presumptions are inferences in accordance with the common experience of mankind and the established principles of logic. The strength of a presumption is dependent on the closeness or uniformity of association of the given fact or facts with the fact inferred. Thus, from the fact that the ground is wet, the presumption that it has rained will be strengthened according to the appearance of the ground, the extent of the wet area and other incidents excluding other causes for the condition.

KINDS OF PRESUMPTIONS.—Writers on legal topics speak of presumptions of *fact* and presumptions of *law,* and divide the latter into *disputable* and *indisputable* presumptions. *Presumptions of law are only strong presumptions of fact.* Where public policy or welfare are involved, these *strong presumptions of fact* are usually *indisputable presumptions of law.* Thus, rational men usually intend the reasonable and probable consequences of their conscious acts and, therefore, where the act is unlawful, the law conclusively presumes such intent. A party will not be permitted to show that he really intended otherwise. In criminal law an act is inevitably characterized by its consequences, when reasonable and probable, regardless of the real intent of the actor. In this connection we are interested only in certain presumptions of fact in which no questions of the policy of the law are involved. They are only the application of the principles of logic to the ascertainment of facts which are the subject of inquiry in judicial tribunals.

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[1] Thrasher *v.* State, 92 Neb., 110.

Presumption Upon Presumption.—As a matter of evidence a presumption cannot be based upon a presumption. Thus, it is too remote to presume an accidental injury from lifting a box, when the fact of lifting the box must be presumed from the facts and circumstances.[2] Here there was sufficient evidence to justify the inference that the patient did lift and carry the box in question, and also that he was injured by force or violence, but there was no evidence to connect the injury with the handling of the box. Other probable causes of the injury were not excluded.

Mental Convictions.—To produce a given mental conviction some fact or state of facts having a probative tendency in that direction, must be adduced. Evidence precedes rational conviction. Hence the law naturally places upon the party who asserts a certain proposition the burden of introducing some evidence to establish his contention. If he alleges that his adversary was negligent whereby he was injured, he must show by some *evidence* both the *negligence* and the *injury*. In the law of evidence nothing is taken on faith, and what cannot be proven, either directly or from inference from which the possibility of mistake is substantially eliminated, is treated as though it did not exist. The law always requires the best evidence. Juries in determining ultimate facts may draw any rational, reasonable conclusions from the facts in evidence before them.

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[2] Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill., 625.

Application of the Maxim.—Now, it sometimes happens that the party complaining cannot produce direct evidence of the negligent act, the proof thereof being entirely within the control of his opponent; but he may be able to produce abundant facts from which, unexplained, reasonable minds would naturally draw the conclusion that the party against whom he complains was in the wrong. Therefore,

The Reasons for the Rule.—*The necessity of the case* constitutes the reason for the departure from the usual rules of evidence in such cases. If the general rule were to be applied justice might sometimes be defeated under circumstances from which all rational, unbiased minds would not hesitate to draw a conclusion of wrong conduct on the part of the person sought to be charged. The maxim is a departure from the harshness of the common law, in that it shifts the burden of explanation from the party complaining to the party who naturally is in the best position to know the facts.

When Maxim Is Applicable.—(a) The party against whom it operates must owe the injured party some general or special duty of protection or care, and that duty must have been violated, and (b) the fact must be such as, in the absence of explanation, naturally raises an inference of negligence on the part of some one, in which event the party owing the duty is charged with the burden of showing that the occurrence was without his fault. It has been said that this phrase is often used in actions of injury by negligence when no proof of negligence is required beyond the occurrence itself, "*which is such as necessarily to involve negligence.*"[3]

History and Illustrations.—The doctrine was first applied to a case where a traveler on a public highway, while passing in front of a building adjoining the same, was injured by a barrel rolling out of a second-story door. Barrels, when properly placed, do not, of their own volition, change their position. Hence, negligence of the party in charge of the barrel was properly inferred, and, as the owner of property adjoining the highway owed a person, rightfully using the same, the special duty of so using his property as not to injure the other, the court said that the burden of explaining the circumstances under which the barrel fell, should be upon the owner in posession of the property and the barrel, as he was in the best position to know the circumstances leading up to the accident and injury,—in other words, why the barrel fell.[4] As stated by one authority, "the occurrence itself is evidence of negligence."[5] The doctrine has also been applied to a case where a pedestrian on a sidewalk in a city was injured by a hammer falling from a swinging scaffold which was being used by workmen in front of the building.[6]

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[3] **Bouvier Law Dictionary.**

Effect From More Than One Cause.—The inference would not have arisen in the original case if the evidence had left it uncertain from which of two doors, on different premises, under different control and ownership, the barrel fell. If, from the evidence, the hammer might have fallen indifferently, either from a scaffold under the control of A, or from a scaffold under the control of B, there could have been no presumption that either A or B specifically was negligent. There must be at least a preponderance of the evidence that it came from one rather than the other.

Where the death of a patient might have been caused by the improper administration of an anesthetic by the practitioner or by calcareous degeneration of the heart, the practitioner is not liable unless it is made to appear by a preponderance of all the evidence that death resulted either wholly or in part from the improper use or negligent administration of the anesthetic.[7] Where a result may be explained by either of several causes its presence does not establish either, and the greater the number of probable causes the weaker the inference of any one cause.[8]

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[4] Byrne *v.* Boadle, 2 H. & C., 722; Scott *v.* L. St. K. D. Co., 13 L. T. Rep. 148.

[5] Cunningham *v.* Dady, 191 N. Y., 152, 155; Ennis *v.* Gray, 87 Hun (N. Y.), 355, 361.

[6] Hunt *v.* Hoyt, 20 Ill., 544.

As Applied to Physicians and Surgeons.—X-RAY.—Where it appeared from the evidence that, owing to idiosyncracies which cannot be discovered beforehand, burns are likely to occur from X-ray applications even when handled with due care, the Court held that the fact that a patient was burned did not of itself establish negligence on the part of the operator, and that the doctrine of *res ipsa loquitur* did not apply, but that the patient had the burden of showing that the operator was negligent, and that such negligence was the proximate cause of the injury complained of. However, the Court considered that negligence on the part of the operator resulting in the burning of the patient was shown by the facts that the exposure was from 30 to 40 minutes, and that no attention was paid to the complaints of the patient of a tingling sensation during the progress of the exposure.[9] However, burning a patient by X-ray is *prima facie* evidence of negligence; that is to say, the result, unexplained, condemns the operator and casts upon him the burden of showing how it happened without his fault, and if he fails he is liable.[10]

SPONGE CASES.—This doctrine is illustrated in cases where absorbent gauze or sponges, or other foreign bodies, are left in the abdominal cavity after operations. The presence of the intruder, left without purpose, impels the unbiased mind to the inference that the surgeon in charge failed to do his whole duty and, because of that inference and the fact that he owed the patient a special duty of care and skill, the law casts on him the burden of showing that he was without fault. Of all persons, he ought to know why the foreign substance was left there. The broad equities of the case and common conscience demand that he be called upon to explain the occurrence and show, if he can, that he did all that could be done, or should have been done, under the circumstances to find and remove all foreign objects. An explanation that merely shifts the blame on others will not suffice. In the language of one of our courts,—

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[7] Yaggle *v.* Allen, 48 N. Y. Supp., 827.

[8] Ewing *v.* Goode, 78 Fed., 442.

[9] Runyan *v.* Goodrum,—Akr.—; 13 ALR, 1403; 21 R. C. L., 386.

[10] Shockley *v.* Tucker, 127 Ia., 456, 26 ALR, 727.

"Why was there left in the parts a foreign substance which the operating surgeon should have removed? It was for him to acquit himself of negligence with respect to it. The sponge escaped his observation? Why? Was it so hidden and concealed that reasonable care on his part would not have disclosed it, or were conditions such that, in his professional judgment, further exploration by him for sponges would have endangered the safety of the patient? In a word, did he do all that reasonable care and skill would require? Except as one or the other of these questions can be answered affirmatively, from the evidence, *the law will presume to the contrary and attribute the unfortunate consequences to his contributing negligence.* Neither does the defendant, nor a single witness in his behalf, undertake to give any explanation of the fact that a sponge, which the defendant should have removed, was allowed to remain, except to say that the nurses failed to keep accurate count. From all that appears in the case, the retained sponge might readily have been discovered by the surgeon, and reasonable prudence and care on his part would have avoided the accident. If this were so, clearly his negligence contributed with that of the nurses and responsibility therefor, in law, attached." [11]

Death From Anesthetic.—Since some danger to the patient is always present in the administration of a general anesthetic, the fact alone that a patient dies while under the influence of a general anesthetic for the purposes of a surgical operation does not raise a presumption of negligence on the part of the surgeon or the anesthetist, and the maxim, *res ipsa loquitur*, does not apply.[12]

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[11] Davis *v.* Kerr, 239 Pa. St., 351. *See* Palmer *v.* Humiston, 87 Ohio St., 354; Gillett *v.* Tucker, 67 O. St., 106; Olander *v.* Johnson, 258 Ill., App. 89.

As Applied to Dentists.—Leaving part of a brooch in a tooth and closing up the cavity, should trouble afterwards result therefrom, would cast upon the operator the burden of showing that he was without fault in the premises. The presene of the broken end of the brooch requires an explanation from the person responsible for its presence, and a failure in this respect rightfully fixes his responsibility.[13] A complete fracture of the submaxillary, while extracting a tooth, is of such rare occurrence, where proper care is exercised, as to raise a presumption of negligence on the part of the extractor, and the law should impose upon him the burden of showing that he exercised due and reasonable care and skill under the circumstances. It has been held, however, that dislocating the jaw in extracting teeth does not raise a presumption of negligence.[14] Letting a tooth go down the windpipe of a patient who is under the influence of an anesthetic raises a presumption of negligence on the part of the operating dentist and casts upon him the burden of showing that the incident occurred without his fault.[15]

Where Not Applicable.—Where the inference is uncertain and doubtful the maxim does not apply. Thus, where the evidence is uncertain whether the foreign body was left in the cavity by the operating surgeon at the time of closing the incision from the original operation, or was put in afterwards by others, independent of the operator, in the course of drainage, the doctrine would not apply.[16] In the Harris case last cited there was evidence tending to show that the surgeon should have discovered the gauze during his course of treatment after the operation and before the termination of the relation.

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[12] Loudon *v.* Scott, 58 Mont., 645, 12 ALR, 1487.

[13] Van Skike *v.* Potter, 53 Neb., 28.

[14] Donoghue *v.* Shane, 170 Mich., 544; 136 N. W., 367; Blodgett *v.* Nevius, 189 Ill. App., 544.

[15] Keily *v.* Colton, 1 City Ct. (N. Y.), 439; *See* McGehee *v.* Shiffman, 4 Cal. App., 50.

[16] Harris *v.* Fall, 177 Fed., 79; 27 L. R. A., 1174; Holmes *v.* McKennan, 120 Ill. App., 320.

Infection.—Ordinarily the sequence of an aggravated condition, does not raise any presumption of improper treatment. Where a condition can be explained by either of several causes, its presence proves neither. Thus, the presence of infection following treatment does not of itself prove that the practitioner was at fault, because the trouble may have been introduced by other means, either before or after the services.[17] Evidence must be produced to *connect* the *treatment* with the untoward *result.*

Generally speaking the doctrine of *res ipsa loquitur* has no application in malpractice cases and unfortunate or bad result does not supply proof of negligence. Furthermore, where the evidence is such that the inference of neglect is purely a matter of speculation, it is insufficient to support a verdict of guilty against the physician or surgeon.[18]

The doctrine does not apply where the injury is one which might have occurred even though proper care had been exercised.[19]

It has been said that the court can say as a matter of law that when a surgeon, in the course of an operation, introduces into a wound a foreign substance, and then closes up the wound inadvertently leaving that foreign substance in the body, there being no possibility of any good purpose or effect resulting therefrom, such act constitutes negligence. "We think," said the court in one case, "all the witnesses who testified on the subject on both sides admitted that, under the circumstances, the leaving of the sponge in the wound was negligence.''[20]

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[17] Friend *v.* Kramer, 236 Pa. St., 618; Ewing *v.* Goode, 78 Fed., 442; Moline *v.* Christie, 180 Ill. App., 334; Business M. Acc. Assn. *v.* Schiefelbusch, 262 Fed., 354.

[18] Gallaher *v.* Kermott, 56 N. D. 176; 216 N. W. 569; Kuhnemann *v.* Boyd, 193 Wis. 588; 57 ALR, 262.

[19] Beckwith *v.* Boynton, 235 Ill. App., 469.

In an action for damages for malpractice, in which the plaintiff claimed to have lost a leg as a result of negligence of the physician in treating an injured foot, it was held that, where the acts or omissions of the physician might be either consistent or inconsistent with proper practice, the burden was on the patient to establish, by competent expert testimony, the negligence of the physician as alleged.[21]

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[20] McCormick *v.* Jones, 152 Wash. 508; 65 ALR, 1019, at 1021; Jordan *v.* Seattle, 30 Wash. 298.

[21] Gallaher *v.* Kermott, 56 N. D. 176; 216 N. W. 569.

CHAPTER XII

OBLIGATIONS IMPOSED BY LAW

Origin of Duty and Law.—Duties and obligations are created by the reaction of individuals upon each other in their diversified relations in life. All laws arise out of these duties. The relation creates the duty and, owing to the perversities and limitations of human nature, the duty necessitates the law. These relations of individuals to each other are of two distinct kinds,—(a) *Involuntary* and (b) *Voluntary.*

(a) *Involuntary relations* are those which necessarily spring from the mere fact of being born into and becoming a member of a family, tribe, group or community. They are not a matter of individual choice. Of course, after a certain age, under usual and normal conditions, a party may *select*, but he cannot well *avoid,* human environment. The relation creates mutual duties and obligations, which, when appreciated by the community, create the necessity for law. The latter represents the will of the majority. As illustrations, we have the laws against violation of the rights of the person, such as murder, mayhem, battery, etc., and the laws against the violation of the rights of property, such as theft, etc. If people did not necessarily come together in pairs, families, groups or communities, or if they were so constituted organically, or so related to their environment, that no act of one could possibly affect another, no duty would arise, and therefore no law would be required to define or enforce that duty. As above stated, the relation creates the duty, and the proneness of humanity to disregard the duty and to resist restriction of individual action necessitates the law.

(b) *Voluntary relations* are those assumed by the individual as a matter of choice. They grow out of contract, express or implied. Usually the duty one to the other is measured by the contract. However, there are certain contractual relations which affect the community as well as the individuals who are parties to them, and, as a consequence, certain duties and obligations are imposed as a matter of public conscience, policy and convenience, and laws are formulated defining and enforcing those duties and responsibilities. Illustrative of the latter case of voluntary relations are the marriage relation, the relation of physician and patient, etc. On the marriage relation, for ages, the sentiment of mankind, as announced by law, has impressed certain duties and engrafted certain rights which the parties may not have considered at the time, and which they may have agreed to disregard; such as, the continuity of the relation during life, the support of the family, etc. On the relation of physician and patient, the law wisely imposes certain obligations which the parties may not have discussed at the time of entering into the relation; such as, questions of *skill, care,* and *judgment.*

From the earliest times the medical man has occupied a special relation towards his patient with corresponding duties imposed by law, and he has been held responsible for damages to his patient resulting from his failure to discharge his duty in that respect by employing proper treatment. The celebrated code of Hammurabi (B.C. 2285-2242) made provisions for situations of that character and even provided penalties against the practitioner in extreme cases.

Measure of Duty.—There are two kinds of duties,—(a) *Negative* and (b) *Affirmative.* In the first kind of duty, refraining from action in the premises constitutes the limit of responsibility. Such duty is easy to define, is readily comprehended by all and its legal and ethical measure is expressed in the three words, "Thou shalt not." Its ethical measure was expressed in Indian philosophy in the words "What you don't like when done to yourself, do not do to others." That, however, is merely a measure of our negative duties. But abstention from action does not measure the whole duty of man to man. Confucius saw the inadequacy of the above rule as a general ethical guide to conduct and said: "To serve my father as I would require my son to serve me,—to this I have not attained. To serve my Prince as I would require my Minister to serve me,—to this I have not attained. To set the example in behaving to a friend as I would require him to behave to me,—to this I have not attained." Manifestly in civilized society we owe many affirmative duties to each other, but what is the measure of those duties? What is the norm to be applied? Confucius suggested a rule in the above quoted comment wherein he measures his affirmative duty to his father by the service he would require from his son, etc. For ages mankind have been groping for an exact statement of the rule, but it has not yet been formulated and the best which has been given to us thus far is *Do unto others as you would that they should do unto you.* In such situations and under such responsibilities exactness cannot be attained and we are forced to deal in relatives, both in ethics and in law.

Implied Conditions of the Relation.—*Skill, Care,* and *Judgment* are required in the performance of every undertaking. They are inherent in our ideas of proper conduct, and are an implied stipulation of every engagement. Their degree varies with the character of the act in question, and is proportionate to the nature of the calling involved and the purposes and aims of the efforts. *They have a direct relation to the risk involved.*

Public Policy.—These requirements are elementary, and the law is merely declarative of the basic principles of our notions of right and justice. They have their foundation in most persuasive considerations of logic, equity and public policy. The purpose of the law in incorporating these implied stipulations as binding obligations of the relation of physician and patient is to protect the health and lives of the public from the unskillfulness, carelessness and bad judgment of practitioners by holding them liable to respond in damages for injuries resulting from default in either of these respects.[1] Therefore, questions of *skill, care and judgment* are always raised in actions of malpractice. The untoward result complained of may have happened because of the *ignorance, carelessness* or *bad judgment* of the party sought to be charged.

Statement of the Obligations.—A person who offers his services for employment in any profession, as a practitioner in that profession, by implication contracts with his employer, and by positive requirement the law demands—

First.—That he possess that reasonable degree of learning, skill and experience (a) which is usually possessed by members of the profession at the time and place, and (b) which is ordinarily regarded by the community, and by those conversant with that profession, as necessary and sufficient reasonably to qualify him for such employment;

Second.—That he will exercise reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge to accomplish the purpose for which he is retained, and

Third.—That in the exertion of his skill and the application of his care and diligence, he shall use his best judgment.[2]

Obligation Measured by Liability.—The implied obligation of a practitioner, retained to treat a person professionally, extends no further, in the absence of special agreement, than that he will indemnify his patient against any injurious consequences resulting (a) from his want of the proper degree of skill, or (b) from his failure to exercise due care, under the circumstances, or (c) from his neglect to use his best judgment in the premises in the execution of his employment.[3]

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[1] Nelson *v.* Harrington, 72 Wis., 591.

[2] Leighton *v.* Sargent, 27 N. H., 460; Kuhn *v.* Brownfield, 34 W. Va., 252; Coombs *v.* King, 107 Me., 376; Whitesell v. Hill, 101 Ia., 629; 37 L. R. A. (O. S.), 830, n.

Requirement Is General.—The same obligation rests upon the practitioner of any profession. Persons who offer themselves to the public as practitioners of any profession thereby impliedly promise the persons employing them that they possess the requisite skill and knowledge to enable them to handle or treat with reasonable success such cases as they undertake. This rule does not require the possession of the highest, or even the average, skill but only such as will enable the practitioner to treat the cases undertaken safely and understandingly. "Every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of skill. If he is an attorney, he does not undertake at all events to gain the case; nor does a surgeon undertake that he will perform a cure, nor does the latter undertake to use the highest degree of skill, as there may be persons of higher education and greater advantages than himself. However, he does undertake to bring a fair, reasonable and competent degree of skill."[4]

Degree of Skill Required.—In this connection the word *skill* is used in the broadest sense and means knowledge, qualification, ability, dexterity. The degree of skill required is not capable of exact determination. It can be stated only in relative terms, which are necessarily variable in their nature. Each generation—each moment—takes care of itself.

Measure of Skill.—The practitioner must possess and exercise the reasonable knowledge and skill ordinarily possessed by members of the profession in like localities similarly situated at the time.

When a person assumes the profession of medicine and surgery but makes no special representations as to his skill, the law implies that he thereby represents that he has *an*

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[3] Craig *v.* Chambers, 17 O. St., 253; 9 Cyc. Ev., 851.

[4] Lamphier *v.* Phipos, 8 Car. & P., 478.

ordinary degree of skill, knowledge, qualification and ability in that respect, and holds him accountable to his patient therefor.[5] The presumption and obligation extend to the positive requirement that *such skill* shall be applied to the particular case in order that the patient may have the benefit thereof.[6] The law implies an undertaking on the part of the practitioner that he will use *reasonable and ordinary skill* in the professional treatment of his patients.[7]

ORDINARY SKILL.—*By ordinary skill is meant such skill as is commonly possessed by men engaged in the profession in similar localities at the time.*[8] The standard of ordinary skill may vary even in the same State according to the greater or less opportunities afforded by the locality for observation and practice.[9] The *reasonable and ordinary skill* which is required of practitioners of any profession is *such as those in the same general lines of practice* at the time and in similarly situated localities, *ordinarily* have and exercise.[10]

BEST SKILL.—A practitioner is not chargeable with negligence for failure to use his own best skill, if he uses the skill which is exercised generally by practitioners of ordinary skill in similar localities at the time, provided his conduct is consistent with due care and good judgment under the circumstances.[11]

HIGHEST SKILL.—*The law does not require that a physician shall have the highest degree of knowledge and skill.*[12] He is not bound to possess the highest degree of art and skill possessed by eminent surgeons practicing in large cities, with every facility for improvement.[13]

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[5] Ritchie *v.* West, 23 Ill., 329, 330.

[6] Barnes *v.* Means, 82 Ill., 379, 384.

[7] Chitty on Contracts, 553.

[8] Heath *v.* Glisan, 3 Ore., 64; Dashiell *v.* Griffith, 84 Md., 363.

[9] Smothers *v.* Hanks, 34 Ia., 289.

[10] Carpenter *v.* Walker, 170 Ala., 659.

[11] Dorris *v.* Warford, 124 Ky., 768; 9 L. R. A., 1090.

[12] McNevins *v.* Lowe, 40 Ill., 209, 210; Ritchie *v.* West, 23 Ill., 329, 330.

[13] Small *v.* Howard, 128 Mass., 131.

Average Skill Not Required.—The standard of requirement in this respect is not even as high as the average skill of the competent members of the profession in similarly situated communities generally, at the time, because average means midway between two extremes and, therefore, there must be some competent practitioners on both sides of the line. In its ultimate analysis, *the standard of capacity is the lowest qualification tolerated by law.*[14]

Not the Skill of the Educated Only.—The skill required need not be that of thoroughly educated practitioners only, but must be that of the average contemporaries and associates, having regard to the improvement and advanced state of the profession at the time and place of the treatment.[15]

Only the Competent Considered.—While the law does not exact the highest degree of skill and proficiency obtainable in a profession, still it does not, on the other hand, contemplate mere average merit, including the skillful, unskillful and incompetent.[16] In order to determine who will come up to the legal standard, we are not permitted to aggregate into a common class the quacks, the charlatans, the empirics, the new men who have had no practice, the antiquated ones who have dropped out of the practice, the skilled and the unskilled, the good and the very best, and then strike an average between them, as such method would place the standard too low. In fixing a standard and striking an average only the ordinarily and reasonably skillful and competent should be considered.

Locality and Time Affect Skill Required.—A physician practicing in a small village who undertakes to perform a difficult operation, is bound to possess that skill and ability only which physicians and surgeons of ordinary ability and skill practicing in similar localities at the time, with opportunities for no large experience, ordinarily possess.[17] In determining what constitutes the reasonable and ordinary skill and diligence which it is the duty of a physician to possess and exercise, the test is the degree of skill and diligence which other physicians in the same general neighborhood, and in the same general line of practice, at the time, ordinarily have and practice.[18] In other words, a physician must have such skill as physicians in the same general community in the same general line of practice ordinarily have and exercise in like cases.[19] A physician is required to use no more skill than that of the physicians of his neighborhood, if there are other physicians there of average ability when compared with similar localities. In its ultimate analysis the rule means that *the practitioner must exercise the average degree of skill possessed by ordinarily and reasonably skillful members of the profession in such localities generally, at the time,* and not a standard determined by the average skill in his own locality.[20]

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[14] Holtzman *v.* Hoy, 118 Ill. App., 534.
[15] Peck *v.* Hutchinson, 88 Ia., 320.
[16] Holtzman *v.* Hoy, 118 Ill. App., 534.

AILMENT TREATED.—*The degree of skill required has no relation to the character of the services to be performed in the particular case.* The standard of knowledge and skill fixed by the law for the practice of the profession has no relation to the condition or disease treated, is not in proportion to the severity of the injury, nor the nature of the operation, nor is it dependent upon the circumstances of the case.[21]

PROOF OF SKILL.—A license is *prima facie* evidence of the possession of skill and, in the absence of evidence to the contrary, is sufficient to establish that fact, but speaking generally, where skill is an issue in a case, it can be proven or disproven only by expert witnesses.[22]

INFERENCE OF WANT OF SKILL—If the ground of complaint be stated as want of skill, the evidence must have reference to lack of that qualification as displayed in the particular case. It is quite clear that the treatment might show such gross ignorance of the business of the practitioner as to put it beyond all doubt that he has not the amount of skill usually possessed by members of the profession or even, in fact, that he had no knowledge of his profession at all.[23] It might appear that the course pursued was wholly unknown to the profession and that it resulted, as it necessarily must, in detriment to the patient. Certainly nothing further would need to be shown to render answerable for an injury done, one who should offer his services as a skillful practitioner.[24]

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[17] Small *v.* Howard, 128 Mass., 131.

[18] Force *v.* Gregory, 63 Conn., 167.

[19] Gates *v.* Fleisher, 67 Wis., 504; Nelson *v.* Harrington, 72 Wis., 591.

[20] Gramm *v.* Boener, 56 Ind., 407; Kelsey *v.* Hay, 84 Ind., 189.

[21] Utely *v.* Burns, 70 Ill., 162, 164.

[22] Loudon *v.* Scott, 58 Mont. 645, 12 ALR, 1487; Pettigrew *v.* Lewis, 46 Kan. 78.

Skill at Time of Service.—The inquiry as to skill must be directed to the time of the alleged malpractice, not to a period long subsequent thereto. Possession of skill today does not tend to establish skill two years ago.[25]

Degree of Care Required.—*Care is attention with a view to safety or protection;* or oversight or watchful regard, implying concern or a sense of personal responsibility, in an endeavor to promote an aim or accomplish a purpose. It is a relative term and varies according to the danger involved in the want of vigilance.

Due Care means attention according to circumstances. All the circumstances must be taken into consideration in determining what is due care.

As a general rule, he who undertakes for reward to perform any work, is bound to use a degree of care, diligence and attention adequate to the performance of his undertaking, according to the rules of the particular art involved. Care must be proportionate to the extremities of the situation. The degree of care, like the degree of skill, is not capable of exact determination or statement. Here again, we are forced to resort to relatives. *Ordinary* care and diligence, under the special circumstances, constitutes the measure of duty and responsibility of the practitioner in the application of his skill and knowledge in the treatment of his patients. He must act with the reasonable care and diligence ordinarily and reasonably used by ordinary practitioners of the profession in average localities similarly situated at the time.[26]

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[23] Com. *v.* Thompson, 6 Mass., 134.
[24] Leighton *v.* Sargent, 31 N. H., 119.
[25] Leighton *v.* Sargent, 31 N. H., 119.

Measure of Care.—The practitioner must exercise that degree of care which ordinarily skillful, careful and prudent practitioners exercise under the circumstances in the locality at the time.

Ordinary Care.—The reasonable and ordinary care which is required of practitioners of a profession, is such care as those in the same general neighborhood, in the same general lines of practice, at the time, ordinarily exercise in like cases;[27] such care as may be reasonably expected under the circumstances from one having the skill he is required under the law to possess or such care as one in his position should be expected to use, in case he has extraordinary skill. If he knows a certain course or act is positively dangerous he may not disregard that knowledge even though the profession generally would not condemn the act or course in question. He may not disregard his own point of view; in any event, he must exercise care in the light of the average knowledge of the profession at the time and place. Due care today may, by reason of increased experience and enlightenment, become gross negligence tomorrow.

Highest Care.—A practitioner is not required, as a matter of law, to use the highest degree of care of which he is capable, if the care which he does exercise is that degree which is exercised generally by practitioners of usual and ordinary skill and care in similar localities, under the same or similar circumstances, provided his conduct is consistent with ordinary skill, having reference to the state of the science in the locality at the time.

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[26] Ritchie *v.* West, 23 Ill., 329, 330; McNevins *v.* Lowe, 40 Ill., 209, 210; Beck *v.* German Klinik, 78 Ia., 696.

[27] Carpenter *v.* Walker, 170 Ala., 650.

Carelessness—Misconduct.—Carelessness is an act of omission and involves an abuse of discretion under a definite obligation; misconduct is an act of commission by violating a definite law or duty. Misconduct is a forbidden act and is, necessarily indefinite, depending upon the circumstances.[28]

Carelessness Never Excused in Law.—That others have been similarly careless is no defense to an action for malpractice. The fact that all men are sometimes careless, does not excuse any man for being careless at any time.[29]

Nature of Judgment Required.—In the discharge of every mandate there is involved the exercise of more or less judgment. However menial the service may be, a certain latitude of discretion is necessarily incident to its performance. You cannot eliminate this human element from any conscious effort. From the laborer who digs in a ditch to the surgeon who holds a life in his hands, the element of judgment in the discharge of his duties is an essential part of the undertaking. In employing a person for any task, the employer knows that the exercise of *that* person's judgment will be involved in the performance of the services, and it is *that* person's judgment which is being paid for. We do not expect omniscience nor infallibility, and the law does not require that standard. A man's judgment may be good, bad or indifferent and, whichever it is, the employer engages that and nothing more, and *the servant has discharged his whole duty when he has given his employer his best judgment.*[30]

Requirements Stated.—In every contract of service the law injects the stipulation that *the servant must use his best judgment in the discharge of his duties.*

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[28] Citizens Ins. Co. *v.* Marsh, 41 Pa. St., 386, 394.
[29] Samuels *v.* Willis, 133 Ky., 459; 19 A. C., 188. (A sponge case.)
[30] Gramm *v.* Boener, 56 Ind., 497.

LATITUDE OF DISCRETION.—In all professional services, there is a wide latitude for the exercise of discretion, and the practitioner fulfills his obligation in this respect when, in good faith in the exercise of due skill and care, after reasonably informing himself, he determines the course to pursue. The medical and surgical practitioner is continually required to exercise his discretion as to the course of treatment, or method of operation to be pursued. Herein, *he owes his patient his best judgment and nothing more.*[81] Of course, as a basis for the exercise of that judgment he owes his patient the obligation carefully to diagnose the case, and reasonably to inform himself of conditions and circumstances. In any event, that judgment must be exercised which may reasonably be expected from an average practitioner at the time and place, otherwise it would indicate want of proper skill or due care. Even though a practitioner does what his judgment approves at the time, still he may be guilty of negligence in not having sufficiently and properly informed himself of existing conditions,—a circumstance which might arise either from want of skill or from carelessness.

Physicians and surgeons must be allowed a wide range in the exercise of their judgment and discretion in the treatment of their patients. The science of medicine is not an exact science. It is empirical and uncertain and sometimes only an approximation. The issues of life and death are uncertain, inscrutable and generally incapable of exact determination beforehand. In many instances there can be no fixed rule by which to determine the course of procedure, and in such cases the physician must be guided solely by his own best judgment and act accordingly, after proper diagnosis.

Surgeons performing an exploratory operation resulting in the removal of a kidney cannot, as a matter of law, defeat an action for malpractice by testimony that, possessing ordinary knowledge and skill, they unanimously determined on the course pursued in the exercise of their best judgment, if they did not in fact use ordinary care in making their diagnosis after exposing the kidney, or if they were in fact chargeable with negligence in removing it.[32]

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[81] McKee *v.* Allen, 94 Ill. App., 147.

No Guaranty That Judgment is Correct.—A physician does not guarantee that his judgment is correct, nor that it is as good as the judgment of some other practitioner. *When, in the exercise of reasonable and ordinary skill and due care, he gives his patient the benefit of his best discretion, he has done all that the law requires and he is not liable in damages, even though his judgment is wrong and his patient is injured thereby.*[33] Of course reasonable information must precede the exercise of good judgment. Good faith requires that from proper diagnosis, the practitioner reasonably understands before he decides. If he makes a skillful and careful investigation, in good faith, he is not liable even though his diagnosis is wrong, and, on the other hand, assuming that his diagnosis is correct and that, in the exercise of his best judgment, he arrives at a wrong conclusion, still he is not liable for the inconvenience or damage which his patient may suffer.[34]

Different Methods.—Where, under the usual practice of the profession, different courses of treatment or procedure may properly and reasonably be applied, and the patient does not limit the practitioner to any particular treatment or procedure, the latter has a right to use his best judgment as to the manner and means of treatment and procedure, and he will not be liable in an action for malpractice so long as his conduct is not inconsistent with ordinary skill and due care under the circumstances. If a practitioner uses his best judgment in all respects he is not liable in damages to his patient for malpractice, provided his conduct was not inconsistent with the possession and use of ordinary skill and due care under the circumstances, even though some other practitioner would have pursued a different course, and the results show that the former was mistaken.[35]

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[32] Kimble *v.* Roeder, (Neb.) 214 N. W. 1.

[33] Wilkins *v.* Ferrell, 10 Tex. Civ. App., 231.

[34] Patten *v.* Wiggins, 51 Me., 594; Williams *v.* Peppleton, 3 Ore., 139; Fisher *v.* Niccolls, 2 Ill. App., 484.

Dual Purpose.—As in the case of all duties imposed by law, these rules have a dual significance, for while (a) they measure the responsibilities of the physician to his patient, (b) they also define the rights of the patient against the physician; in other words the object of the law is two-fold, (a) to guard the patient against the wrongful practice of ignorant or negligent physicians and (b) to protect the faithful practitioner of ordinary learning, skill, experience and ability and of ordinary care from loss in reputation or purse on account of matters for which it would be unreasonable to hold him responsible.[36]

Presumptions of Skill, Care and Judgment.—In the absence of evidence the law indulges no presumption of want of skill, care or good judgment; neither does it infer the presence of these qualities.[37] It is not enough to render a practitioner liable to show that he has a less degree of skill than some other practitioner might have shown, or that he exercised a less degree of care than he himself might have been able to bestow; or that he made a mistake in judgment; nor is it enough that he even acknowledges some want of care or some error in judgment: There must have been a want of ordinary skill and care to such a degree as to have led to the bad results.[38] The manner in which the services were performed is the true test of their character.[39] In the absence of proof, the courts presume that the work was skillfully and carefully done and that the practitioner used his best judgment, or rather, at least, the burden is on the patient to establish the contrary, and in the absence of any proof there would be no basis for a claim for liability.[40]

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[35] Luka *v.* Lowrie,—Mich.,—; 41 L. R. A., 290.
[36] Loudon *v.* Scott, 58 Mont., 645, 12 ALR, 1487.
[37] Davis *v.* Kerr, 239 Pa. St., 351.
[38] Rich *v.* Pierpont, 3 Foster & F., 35.
[39] Bute *v.* Potts, 76 Cal., 304.

INFERENCES FROM INJURIOUS RESULTS.—Ordinarily the fact that injurious results followed treatment does not justify an inference of want of skill, care or good judgment. The consequences complained of may be the result of the patient's condition, and in no respects due to the conduct of the practitioner. Generally speaking, the fact that a patient is suffering from some abnormal condition after the services, or that he received no benefit from the treatment, or that the practitioner failed to accomplish satisfactory results, does not raise any presumption of want of skill, care or good judgment.[41] Default in these respects must be established, usually by the testimony of experts, from all the facts and circumstances in the case. The result of treatment is often only a minor consideration.

That a fractured limb is shorter than the other after the recovery of the patient, is not conclusive evidence that the practitioner was negligent, as such condition might result from the nature of the fracture or the condition of health and age of the patient.[42] The burden of explaining the fact is on the patient and he must show that improper treatment of the case was the primary cause for the shortening.

However, letting a tooth go down the windpipe of a patient who is under the influence of an anesthetic raises a presumption of negligence on the part of the operating dentist and casts upon him the burden of showing that the incident occurred without his fault.[43]

Also, it has been held that failure of a physician to discover a serious rupture of the perineum, after repeated examinations for that purpose, is actionable negligence.[44] In the case cited, the *condition must have been such as to make the failure to discover the ailment inconsistent with reasonable skill or ordinary care.* The jury may find that it is negligence for an attending physician to fail to discover and remove a detached portion of the placenta after a miscarriage.[45]

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[40] State *v.* Housekeeper, 70 Md., 162.

[41] Friend *v.* Kramer, 236 Pa. St., 618.

[42] Piles *v.* Hughes, 10 Ia., 579.

[43] Keily *v.* Colton, 1 City Ct. (N. Y.), 439; *See* McGehee *v.* Shiffman, 4 Cal. App., 50. For full discussion see chapter on *Res Ipsa Loquitur.*

Assumption of Risk.—A patient assumes all ordinary and usual risks and dangers incident to the administration of anesthetics, the performance of a surgical operation, the taking of an X-ray photograph, and other professional services when done in a skillful and careful manner, but he does not assume the risk of negligence by the physician, and for injuries resulting from such negligence, the physician must at all times, when called upon, respond in damages.

Agreement Waiving These Requirements.—*A practitioner cannot contract with his patient against his responsibility for negligence growing out of his want of skill or care,* or his failure to exercise his best judgment in his services to his patient, as such an agreement is against public policy and, therefore, void.[46]

Agreement for Special Skill.—A practitioner may agree to bring to the aid of his patient a higher degree of skill and to exercise a higher degree of care than the law imposes on the relation, and he will be required to fulfill his special promise. If the practitioner defaults, the patient will have a right of action for breach of contract. If the patient relies on specific representations of extraordinary skill and ability on the part of the practitioner, he must allege such facts in his declaration, because the law does not imply them from the relation.[47]

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[44] Lewis *v.* Dwinell, 84 Maine, 487.
[45] Moratzky *v.* Wirth, 67 Minn., 46; *See* Langford *v.* Jones, 18 Ore., 407.
[46] Hales *v.* Raines, 162 Mo. App., 46.
[47] Goodwin *v.* Hersam, 65 Minn., 233.

Specialists.—Where a person holds himself out as a specialist in the treatment of a certain organ, anatomical part, physiological function, injury or disease, he is bound to bring to the aid of the one employing him as such, both in diagnosis and treatment, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, part, function, injury or disease, in the same general locality, having regard to the state of scientific knowledge at the time.[48] Thus, one who undertakes to treat an eye as a specialist, must have that degree of care and skill which is ordinarily possessed by physicians who devote special attention and study to the treatment of that organ.[49] The physician who makes a specialty of surgery, the oculist, the aurist, the rhinologist, must give to his patient that degree of knowledge and skill which is ordinarily possessed by such specialists in the general locality at the time.[50] As to qualifications, care and judgment, an X-ray specialist is tested by the same rules as other specialists and physicians generally.[51] The skill of the ordinary general practitioner is not to be measured by the skill of the specialist.[52]

Practitioner Must Keep Pace with the Times.—Medical science is moving forward with rapid strides. What is proper practice today may be questioned tomorrow, be abandoned during the week, be antiquated before the close of the month and become all but criminal before the lapse of the year.

Practitioners must progress with their profession. They cannot cling to antiquated and abandoned methods, practices, remedies and appliances and escape liability for injuries resulting therefrom. They should not resort to every new-fangled theory, nor always test the latest fad, but the best generally approved improvement should be resorted to when the proper occasion arises, having respect to the locality and time. What was proper a few years ago may be malpractice today. Present responsibilities are based on present enlightenment and experience.[53]

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[48] Rann *v.* Twitchell, 82 Vt., 79; 20 L. R. A., 1030.

[49] Feeney *v.* Spalding, 89 Me., 111.

[50] Baker *v.* Hancock, 29 Ind. App., 456; 20 L. R. A., 1030.

[51] 13 ALR, 1414.

[52] Czajka *v.* Sadowski, 243 Mich. 21; 219 N. W., 660.

Experimentation.—*The policy of the law is very strict against practitioners trying experiments.* In other words, *a physician cannot experiment with his patients to their injury.*[54]

Established Treatment.—Generally speaking, where there is an established treatment, it must be followed substantially.[55] If the ordinary and established practice of the profession is to treat an ailment in a particular manner, it is the practitioner's duty substantially to follow such practice, and if he adopts some other mode which proves injurious, he is guilty of negligence. Where a particular mode of treatment, to the exclusion of others, is upheld by the consensus of opinion among the reasonably skillful and careful members of the profession, and sustained by the general experience of practitioners, it must be substantially followed by the practitioner and, if he sees fit to experiment with other modes, he does so at his peril.[56] The burden is upon the patient, however, to show that the departure from the established practice was the cause of the injury.[57] The rule does not apply where, for any reason, the established mode of treatment cannot be adopted, or is impracticable.[58]

Gratuitous Services.—Responsibility is not dependent upon nor related to the size or source of the fee. Where the *relation exists*, the *liability attaches.* When a professional man undertakes to render professional services to a patient, the law, from necessity, imposes upon him the duty to exercise the skill, care and judgment heretofore explained, and default therein, resulting in damage to the patient, constitutes a cause of action. Therefore, the fact that the services were rendered gratuitously or were paid for by a third party is no defense to an action for malpractice.[59]

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[53] McCandless *v.* McWha, 22 Pa. St., 261; Van Hooser *v.* Berghoff, 90 Mo., 487; Gramm *v.* Boener, 56 Ind., 497.

[54] Hasse *v.* Knippel, 1 Mich. N. P., 102.

[55] Carpenter *v.* Blake, 60 Barb, 488.

[56] Jackson *v.* Burnham, 20 Col., 532.

[57] Winner *v.* Lathrop, 67 Hun., 511.

[58] Hallam *v.* Means, 82 Ill., 379.

Non-Professional Volunteer.—These requirements of skill, care and judgment are implied by law from the *relation* of practitioner and patient, and therefore do not apply where the relation does not exist. If a person does not profess to be a physician or to practice as such, and is merely asked his advice as a friend or neighbor, he does not incur any professional responsibility in attempting to give relief, and in the absence of malice on the part of the volunteer the person following his advice would have to bear the consequences. Thus, the friend who, in case of neuralgia, cold, indigestion or other infirmity, volunteers advice and assistance to relieve the distress, does not thereby undertake to possess the qualifications of a physician, and where there is no such implied representation the want of such qualifications does not create a liability, even though injury results to the recipient of the services by reason of default in this respect.[60] However, where, with no promise of payment for his services and no expectation on his part of making a charge, a physician, on request, makes an informal examination of and prescribes for a sore finger, advising that it is not a felon, the relation of physician and patient may have been created and if the party, by following his advice, is injured by reason of a mistaken diagnosis and the improper treatment recommended, the physician may be liable in an action for malpractice.[61]

Where the sufferer, in good faith, understands that the party rendering the assistance is a physician and accepts the services in the belief that he is a member of the profession, and where the circumstances of the case and the conduct of the party are such as to justify him in entertaining such belief, the party rendering the assistance may be chargeable with the responsibility, as to skill, care and judgment, of a member of the profession and be required to respond in damages for any injury resulting by reason of his lack of such qualifications, or application.[62]

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[59] Peck *v.* Hutchinson, 88 Ia., 320; Pippin *v.* Sheppard, 11 Price, 400; Becker *v.* Janinski, 15 N. Y. Supp., 675; DuBois *v.* Decker, 130 N. Y., 325.

[60] McNevins *v.* Lowe, 40 Ill., 209; Higgins *v.* McCabe, 120 Mass., 13; Shields *v.* Blackburn, 1 H. Bl., 158; Beardslee *v.* Richardson, 11 Wend., 25.

[61] Peterson *v.* Phelps, 123 Minn., 319, 154 N. W., 783.

Publishing Operation.—A physician is not justified in publishing or causing to be published, without the consent of his patient, an article describing a surgical operation wherein he names or otherwise identifies the patient.[63] In Michigan, at the time of this opinion, there was a statute making a communication from patient to physician privileged from disclosure in court, but the inhibition will be equally true if there is anything in the article which will tend to humiliate the patient or bring her into public ignominy or disgrace. If there is anything in the operation of interest to the public or benefit to the profession, it certainly can be presented without identifying the patient.

Imposing on Privacy.—A physician took with him a nonprofessional unmarried man when attending a woman in confinement, there being no real need of his services to assist the physician either in making the trip or the delivery. The patient and her husband thinking him to be a medical associate of the physician made no objection to his presence in the room. In an action by the patient for the deceit, it was considered that both the physician and the intruder were liable.

Confidence and Public Duty.—The purpose of the relation of physician and patient necessarily requires the latter to make to the former disclosures which, in particular cases may, if they become public, cause the patient embarrassment, humiliation, or even social disgrace. Owing to the necessities of the case, the policy of the law is to encourage full and frank disclosures by patients in order to enable the physician properly to treat their ailments. Therefore, the relation of physician and patient is highly confidential in character, and by the physician, should be regarded as sacred and inviolable.

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[62] Matthei *v.* Wooley, 69 Ill. App., 654.

[63] Sullings *v.* Shakespear, 46 Mich., 408, 412.

However, the physician occupies a two-fold relation towards the subject-matter of his employment, from which there arises a dual duty, (a) *a duty to his patient,* and (b) *a duty to the public.* Where, under any circumstances, the community is involved, its rights are paramount. This fact is recognized and reflected in the statutes of the various states relating to quarantine. These statutes usually impose special duties on physicians for the promotion of the general welfare. Where, pursuant to the requirements of law, a physician makes disclosures to proper authorities of the private confidences of his patient, or of information obtained from private examination, only to the extent which is necessary to a strict compliance with the law on his part, and when his report is made in the manner prescribed by law, he commits no breach of duty to his patient, has betrayed no confidence, and is not liable to the patient for results. Of course the disclosure must not be to any greater extent than is reasonably necessary to comply with the law and protect the public or those who may be affected. Under the police power statutes and ordinances have been passed providing for isolation, segregation or quarantining of persons afflicted with communicable, venereal diseases, and the courts have sustained their constitutionality.[64] Where a physician, in good faith, for the protection of the public, adopts such course as was reasonably expedient or necessary to enforce such regulations, he is not liable to his patient for resulting damages.

Suppose that no statutory duty rests upon the physician, but that the public welfare is involved, what may he rightfully do where a communicable secret disease is discovered? The confidence is imposed by the law as a matter of public policy, and therefore public policy must determine the extent and detail of its application. The patient knows that if his disease proves to be contagious or infectious, the health of his associates and of the community may be endangered, and that these should be protected against infection from him. The patient and the physician are the only persons who stand between the community and contamination. The self-interest of the former makes him a poor protector. The latter is the only person on whom the public can safely rely. Therefore, when the public welfare demands the information, public policy lifts the ban of secrecy to the extent that the protection of the public reasonably requires. Under such circumstances, a disclosure of information is not a betrayal of confidence.[65]

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[64] Brown *v.* Manning, 103 Neb., 540.

"In making such disclosure, a physician must be governed by the rules as to qualifiedly, privileged communications in slander and libel cases. He must be able to show that the disclosure was necessary to prevent spread of the disease; that the communication was to one who, it was reasonable to suppose, might otherwise be exposed, and that he, himself, acted in entire good faith with reasonable grounds for his diagnosis, and without malice." Thus, it has been held that where a physician makes a disclosure of information imparted by a patient to secure treatment, believing that a disclosure was necessary to prevent the spread of the disease, and where the disclosure is made to one who, it is reasonable to believe, might otherwise be exposed, and where the physician acts in entire good faith, with reasonable grounds for his diagnosis, and without malice, he cannot be held liable in damages by his patient, even though he is mistaken in his diagnosis, and has reported that his patient was afflicted with a disease which, in fact, he did not have.[66]

In the Simonsen case the physician diagnosed the trouble as syphilis, but told the patient that it was impossible to be positive without making further tests, and later advised the proprietress of the hotel at which the patient was stopping that he thought the patient was afflicted with a "contagious disease" and that she should be careful to disinfect his bed clothing and wash her hands in alcohol afterwards. As a result of the information, the patient was required to leave the hotel. A subsequent Wasserman test showed negative, and the patient brought suit against the physician for damages, on the ground that the law absolutely prohibited any disclosure, but the court directed a verdict for the physician.

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[65] Simonsen *v.* Swenson, 104 Neb., 224; 9 ALR, 1250.

[66] Simonsen *v.* Swenson, 104 Neb., 224; 9 ALR, 1250.

The law does not favor the concealment by physicians of contagious and infectious diseases, nor the withholding by them of information thereof from those who may come within the influence of the disease.

An improper or unjustifiable disclosure made by a physician in bad faith and from unworthy motives, even when true, may subject him to an action of libel or slander.

Unlicensed Practitioner.—The requirements of law as to skill, care and judgment apply to unlicensed as well as to licensed practitioners and the same tests should be applied. No greater obligations in this respect rest upon the party by reason of the fact that he does not have a license; neither are they less even though the patient knows the want of sanction.[67] But, in an action for malpractice against an unlicensed physician, the burden of showing ordinary skill is on the physician.[68]

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[67] Nelson *v.* Harrington, 72 Wis., 591.
[68] Cf. Nations *v.* Lumber Co.,—La.,—; 48 L. R. A., 531.

CHAPTER XIII

CIVIL MALPRACTICE

Definition.—*Civil Malpractice is improper treatment of a patient by a practitioner whereby the patient is injured.* It means default in some one or more of the legal requirements of skill, care and judgment, as discussed in the preceding chapter. The fault may be an act of either omission or commission, and may result from (a) ignorance, (b) carelessness, or (c) poor judgment. Malpractice cannot be predicated unless there is a breach of the legal duty heretofore discussed.

Essentials of Liability.—In order to maintain an action for malpractice against a physician, a patient must prove by competent evidence,

(a) *Improper treatment* and

(b) *Injury from such treatment.*

Improper treatment without injury, or injury not shown to be the *result* of improper treatment, is not enough to make a case of malpractice in law. Unless both exist in the relation of cause and effect, and not as a mere coincidence, the patient has no reason for complaint, but, if, because of default shown, the service did the patient no good, the practitioner would not be entitled to receive any fee, in the absence of a special agreement for a fee in any event.

Propriety of Treatment.—Generally the propriety of the treatment is a question for expert medical evidence. Where an action was based upon alleged malpractice in an operation on the eyes of a patient, the court considered that to maintain the action the patient should have offered the evidence of skilled witnesses to show that the present condition of the eyes was the result of the operation, and that it was unskillfully or negligently performed.[1] It is apparent from the very nature of things that this evidence must come from medical men, as other witnesses are not competent to give it, nor, on the other hand, are juries supposed to be conversant with the science and practice of the profession to that degree which will enable them to dispense with professional explanations. The questions involved are of a special and highly technical science, and can be determined only by the testimony of those who are skilled therein.[2]

Negligence.—*Negligence is the absence of care according to circumstances.*[3] "Negligence is the failure to observe for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."[4] Malpractice is a branch of the general law of negligence.

The physician who fails to do what a reasonably prudent practitioner would have done under the circumstances, or does what a reasonably prudent practitioner would not have done under the circumstances, whereby the patient is injured, is considered quilty of negligence and is liable for the damages sustained by his patient.[5] Negligence may be the result of either *ignorance, carelessness* or *poor judgment,* and in either event, the practitioner will be liable to the patient for the consequent damages; but if poor judgment is relied upon as the basis of liability the error must be so gross as to establish either ignorance or carelessness, or that the party did not, in good faith, use his own best judgment.

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[1] Pettigrew *v.* Lewis, 46 Kan., 78.

[2] Moline *v.* Christie, 180 Ill. App., 334; Phebus *v.* Mather, 181 Ill. App., 274, 277.

[3] Turnpike Co. *v.* R. Co., 54 Pa. St., 219, 225; Barker *v.* Essex, 27 Vt., 62; C. B. & Q. R. Co., *v.* Johnson, 103 Ill., 512, 518 *et seq.*

[4] Cooley on Torts, 630.

[5] Alderson, B., in Blythe *v.* Birmingham Water Works Co., 11 Exch., 784.

Intent.—*Intention to injure is not an essential element in an action for malpractice;* in fact, the term negligence excludes the idea of intent.[6]

Good Faith.—Although the practitioner acted in the utmost *good faith,* believing his treatment proper and safe, still, if he was not sufficiently qualified under the law, or if he omitted some duty or performed some negligent act, whereby his patient was injured, he will be liable for the consequences.

Accident.—Accident is "anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a fortuitous event or circumstance." Where an event takes place, the real cause of which cannot be traced or is, at least, not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental.[7] Even though accident and negligence be not opposites, they cannot be regarded as identical, without confounding cause and effect. Accident and its synonyms, casualty and misfortune, may proceed or result from negligence or other causes known or unknown.[8]

Liability for Accident.—For injuries resulting from mere accident, no liability attaches. For a purely accidental occurrence causing damage, without the fault of the person to whom it is attributed, no action will lie; for, although there is damage, the thing amiss,—the *injuria*—is wanting.[9] A patient may be injured under circumstances which, in law, are considered purely accidental. In such cases the practitioner is not liable for the damages sustained by the patient from the injury.

Accident and Negligence.—The term accident, as above used, necessarily excludes the idea of negligence on the part of the practitioner. Merely calling an act, which resulted in injury to another, an accident will not relieve the party of responsibility for his negligence. The untoward result must have been what, in law, is recognized as an accident. Where the negligence of the operator contributed to the untoward result, it was not, as to him, an accident within the meaning of the law of negligence. There must be an entire absence of negligence on the part of the party sought to be charged.[10] An occurrence which, to the patient, may properly be spoken of as an accident, is not necessarily an accident from the viewpoint of the responsibility of the practitioner. If the latter was at fault, the occurrence as to him was not an accident. Where an accident combined with the negligence of the practitioner to produce the injury to the patient, and without which negligence the injury would not have happened, the former is liable for the entire damage.[11]

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[6] Bindbental *v.* Street Rd. Co., 43 Mo. App., 463.

[7] Wabash, etc., R. Co., *v.* Rocke, 112 Ind., 404.

[8] McCarthy *v.* N. Y., etc., R. Co., 30 Pa. St., 347, 351.

[9] Cooley on Torts, 80.

Contributory Negligence.—*Contributory negligence is such an act or omission on the part of the patient, amounting to want of ordinary care, as, concurring with the negligent act or omission of the practitioner, is the proximate cause of the injury.*[12]

Effect.—Where the negligence of the person injured primarily contributed to the injury, by direct association with the cause of action, *he cannot recover damages.*[13] Both parties being in fault with reference to the cause of the injury complained of, *the law leaves the burden rest where it fell.*

When the negligence of both operates contemporaneously, concurrently and jointly to produce the injury, the patient cannot recover but must bear the entire loss alone.[14] A practitioner is liable for the injurious results of his own negligence, although the subsequent acts of the patient, or a nurse, or others over whom the practitioner had no control, may have aggravated the injury.[15] If the improper treatment makes the injury unavoidable and inevitable, an action against the practitioner will not be defeated by the mere fact that subsequent mismanagement, or negligence of the patient, or others may have aggravated the trouble.[16]

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[10] Sutton *v.* Bonnett, 114 Ind., 243.

[11] Rockfalls *v.* Wells, 169 Ill., 224; Weick *v.* Lander, 75 Ill., 93; I. C. R. Co. *v.* Siler, 229 Ill., 390; Joliet *v.* Varley, 35 Ill., 58; Carterville *v.* Cooke, 129 Ill., 152; Joliet *v.* Shufeldt, 144 Ill., 403.

[12] 29 Cyc., 505.

[13] Littlejohn *v.* Arbogast, 95 Ill. App., 605; Haering *v.* Spicer, 92 Ill., App., 449.

[14] Sauers *v.* Smits, 45 Wash., 559; 17 L. R. A., 1242; Sanderson *v.* Holland, 39 Mo. App., 233; Wilmot *v.* Howard, 39 Vt., 447; DuBois *v.* Decker, 130 N. Y., 325; Geiselman *v.* Scott, 25 O. St., 86.

Where the injury resulting from the negligence of the patient can be distinguished from the results of the physician's negligence, the reason for the rule does not apply, and the patient may maintain his action and, in that event, the negligence of the patient can be used only in mitigation of damages, and not to defeat his right of action.[17] And for the same reason a physician will be liable for the damage occasioned by his improper treatment although a part of the patient's sufferings proceed from other causes.[18] Thus, where a physician treated a broken limb in an improper and careless manner, necessarily resulting in permanent injury to the patient, the fact that the contributory negligence of the latter increased the injuries, does not bar his right of action, but affects only the measure of damages.[19]

Reasons for the Rule.—Though the action of malpractice is in the nature of an action for a breach of the implied terms of a contract, the general rules of law governing contributory negligence are applied where both are contemporaneously and concurrently at fault, because of the difficulty which would usually be encountered in an attempt to apportion the injury between them. In this respect, however, there is practically no difference between actions for malpractice and other actions in tort, because, as a matter of fact, all actions sounding in tort have their origin in and are based upon a breach of some obligation imposed by law.

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[15] Carpenter *v.* Blake, 75 N. Y., 12; Sanderson *v.* Holland, 39 Mo. App., 233; Hathorn *v.* Richmond, 48 Vt., 557.

[16] Hibbard *v.* Thompson, 109 Mass., 286; Wilmot *v.* Howard, 39 Vt., 449; Hathorn *v.* Richmond, 48 Vt., 557; Murdock *v.* Walker, 43 Ill. App., 590; Sanderson *v.* Holland, 39 Mo. App., 223; Sauers *v.* Smith, 49 Wash., 557; Morris *v.* Despain, 104 Ill. App., 452; 17 L. R. A., 1242.

[17] Hibbard *v.* Thompson, 109 Mass., 286.

[18] Gates *v.* Fleischer, 67 Wis., 504.

[19] Wilmot *v.* Howard, 39 Vt., 447.

Temperament.—That the natural temperament or physical weakness of a patient contributed to produce the injury primarily caused by the malpractice of the physician, is no defense to an action against the physician for such injury, but the same may be shown in mitigation of damages.[20]

Failure to Obey Instructions.—It is the duty of the patient to obey any reasonable instructions by his physician. Failure of a patient to observe such reasonable instructions and requirements of his physician may be negligence.[21] Thus where a patient fails to return to the office for further treatment, as directed, whereby he suffers injury, though the treatment was proper and skillful, his trouble is attributed to his own carelessness, and he cannot recover from the practitioner.[22] The refusal of the patient to employ an assistant for the practitioner, when the same is necessary and recommended by the practitioner, and the patient is injured by reason of such want of assistance, such conduct of the patient is negligence on his part, entering into the cause of action itself, and will defeat his right of recovery against the physician, unless the conduct of the practitioner, under the circumstances, was such as to be inconsistent with ordinary skill, due care or good judgment.[23]

Independent Services.—If two or more practitioners, simultaneously or successively perform independent services for a patient, neither is liable for the independent malpractice of the other.[24] One practitioner is not liable for an injury inflicted by another, if not partners, unless they acted in concert or co-operation. Where their acts are entirely independent, separate and distinct as to aid, concert, co-operation and advice, there can be no joint liability and each will be liable only to the extent of his own wrong.[25]

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[20] Mullen *v.* Flanders, 73 Vt., 95.

[21] Whitesell *v.* Hill, 106 N. W., 894; Haering *v.* Spicer, 92 Ill. App., 449.

[22] Dashiell *v.* Griffith, 84 Md., 363; Jones *v.* Angel, 95 Ind., 376; 17 L. R. A., 1243.

[23] Haering *v.* Spicer, 92 Ill. App., 449.

[24] Foster *v.* Wadsworth Howland Company, 168 Ill., 514.

Where two physicians are employed on a case and by agreement among themselves divide the services, each is required to exercise the skill, care and judgment above described, and acquiescence by one in careless or improper treatment by the other renders him also liable for the malpractice.[26]

Nurse's Negligence.—The practitioner is not responsible for the consequences of the ignorance, carelessness, or bad judgment of nurses over whom he has no control.[27] But where he selects the nurse and exercises control over her actions, so that she may be said to represent him, or where the physician is careless in observing her careless conduct, he may be liable for injuries resulting from her negligence.[28]

Physician and Dentist.—Where, after taking an X-ray picture, a physician advised the extraction of an impacted and imbedded wisdom tooth, and thereafter administered an anesthetic to his patient in order that the dentist selected by the patient might perform the operation, the dentist alone is liable for his negligence in the aetual extraction of the tooth, whereby the patient was injured, because the co-operation of the two was not as to the particular negligent act causing the injury.[29]

Negligence of Druggist.—The fact that the negligence of a druggist concurred with that of the physician in producing injury or death of the patient cannot be set up as a defense by the physician in a suit against him for malpractice in causing the injury or death.[30]

Negligence of Assistant or Apprentice.—The attending physician is responsible to his patient for the want of skill, care or good judgment of his assistant or apprentice, whom he puts in charge or permits to assist.[31] The assistant is also personally liable;[32] in other words, the assistant, apprentice, interne or nurse is always personally liable to the patient who is injured by his negligence. A physician is not liable for the negligence of an X-ray specialist to whom he sends his patient unless the specialist is a servant of the physician.[33] It is not negligence for a surgeon to intrust the administration of ether to an advanced medical student of experience, especially where it is customary to do so in the place where the operation takes place.[34]

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[25] Yeazel *v.* Alexander 58 Ill., 254, 262; Barnes *v.* Means, 82 Ill., 379.

[26] Stokes *v.* Long, 52 Mont. 470; 159 Pac. 28.

[27] Sanderson *v.* Holland, 39 Mo. App., 233; Baker *v.* Wentworth, 155 Mass., 338.

[28] Stanley *v.* Schumpert, 117 La., 255; 6 L. R. A., 306.

[29] Nelson *v.* Sandell (Ia.) 46 ALR, 1447.

[30] Murdock *v.* Walker, 43 Ill. App., 590.

Partners.—General partners in the actual practice of the profession are liable for the independent malpractice of either.[35]

Negligence of Substitute.—The physician in charge who, leaving town or from sickness or other cause, puts another physician in charge, would not under the ordinary practice, be liable for the malpractice of such substitute.[36] This doctrine is based upon the fact that the substitute does not act under the direction and control of the first physician, but upon his own initiative, judgment and discretion.[37] In recommending a substitute, he owes his patient only ordinary care in the selection, and he will not be liable for the independent malpractice of the physician whom he thus leaves in charge of the case. Unless they are partners, the patient must look to the one in default for the recovery of any damage he sustains by reason of malpractice. However, wherever possible, the patient should be informed of the contemplated substitution and his consent obtained, otherwise the attending physician might be liable for the negligence, if any, of the substitute, in delaying to make his first visit, or in failure to assume charge of the case.[38]

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[31] Hancke *v.* Hooper, 7 C. & P., 81; Chicago R. Co. *v.* Flexman, 103 Ill., 546.

[32] Fish *v.* Walker, 7 Ohio N. P., 472; Reed *v.* Patterson, 91 Ill., 288, 297.

[33] Runyan *v.* Goodrum, 147 Ark. 481; 13 ALR, 403.

[34] Levy *v.* Vaughan, 42 App., D. C., 146.

[35] Hyrne *v.* Erwin, 25 S. C., 226; Haase *v.* Morton, 138 Ia., 205; Whittaker *v.* Collins, 34 Minn. 299; Hess *v.* Lowrey 122 Ind., 225.

[36] Keller *v.* Lewis, 65 Ark., 578; Hitchcock *v.* Burgett, 38 Mich., 501; Myers *v.* Holborn, 58 N. J. L., 193.

[37] Norton *v.* Hefner, 132 Ark., 18; Keller *v.* Lewis, 65 Ark., 578.

Recommendation.—The mere recommendation by one physician of another is held not to render him liable for the malpractice of the other.[39]

Practitioner Not a Guarantor of Beneficial Results.—A practitioner cannot be regarded as an insurer of a successful result from his treatment, and to base a liability on failure alone would be to make him a guarantor.[40]

Intoxication.—Evidence that the practitioner was intoxicated at the time of rendering the services alleged to be improper, is admissible as part of the *res gestæ.*[41]

Physician Engaged in Other Avocations.—It has been held that in an action for malpractice, the patient may show that the practitioner was devoting time and attention to some other avocation, as such fact was considered as having a bearing upon the question of his skill and care.[42]

Other Engagements.—A physician cannot escape liability for damages for neglecting a patient merely by reason of the fact that other patients created such a demand on his energy, time and attention as to necessitate the inattention complanied of. He has no right to make engagements which will interfere with his duty to the patient who has a right to rely upon him.[43] He should have seen to it that some other physician took his place. A great public calamity or a general epidemic in the community might modify the application of this principle.

Selection of Hospital.—Where a physician recommends a certain hospital to a patient, he is not guilty of negligence in refusing to treat him in another hospital to which the patient went without consulting the physician, in the absence of proof (a) that the refusal of the physician was purely whimsical or capricious, and (b) that the patient was justified in refusing to go to the hospital recommended by the physician.[44]

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[38] Jones *v.* Angel, 95 Ind., 376.

[39] Nelson *v.* Sandell, 46 ALR, 1447; 209 N. W. 440.

[40] Quinn *v.* Donovan, 85 Ill., 194, 195; McKee *v.* Allen, 94 Ill. App., 147; Yunker *v.* Marshall, 65 Ill. App., 667; 27 L. R. A., 1235.

[41] Merrill *v.* Pepperdine, 9 Ind. App., 416.

[42] Hess *v.* Lowrey, 122 Ind., 225; Mayo *v.* Wright, 63 Mich., 32.

[43] Sinclair *v.* Brunson, 212 Mich., 387; 12 ALR, 593; Hood *v.* Moffatt, 109 Miss., 757; L. R. A., 1916–B, 622.

Office Practice.—A physician may confine himself to office practice, and he is not guilty of negligence in refusing to go to the home of his patient, who knew his custom, unless some special or extraordinary circumstance or emergency arises, of which the physician has due notice.[45]

Frequency of Visits.—Generally speaking, the physician alone is the judge of the number of visits which shall be made to his patient, and when he will make them, but in determining the matter, he must use the ordinary and usual skill, care and judgment of physicians practicing in the community, or in similar communities at the time, and there can be no recovery for failure on his part to call as often as the patient thinks he should, provided the physician uses his best judgment in the premises, and his conduct is not inconsistent with ordinary skill and care under the circumstances.[46]

Arbitrary Refusal to Take Case.—Since a professional man is not required to render professional services to everyone, he may arbitrarily refuse to undertake the treatment of a case and, in such event, he will not be liable for malpractice whatever may be the consequences to the applicant.[47]

The case last cited was a suit in malpractice brought by the administrator of a deceased person against a physician charging him with wrongfully causing the death of the intestate in refusing to call. The defendant was a licensed physician who was, and for a number of years had been, practicing medicine in the locality, and who held himself out to the public as a general practitioner in that profession. He had previously been the family physician of the deceased. It appears that the decedent became seriously ill and sent for the defendant by a messenger who informed the defendant of the extreme sickness of the decedent, tendered him his usual fee for services and stated to him that no other physician was procurable at the time and that decedent was relying upon him for professional attention and services. In fact, it was conceded that no other physician was procurable at the time and that decedent did rely upon the defendant for professional assistance and relief in the emergency. Without any reason whatever the defendant refused to accept the call or render aid to the decedent. No other patients were requiring his immediate attention and he could have responded to the call without inconvenience. Death ensued without the fault of the decedent.

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[44] Danby *v.* Briggs, (Ala.) 122 So. 394.

[45] Urrutia *v.* Patino, (Tex. Civ. App.) 297 S. W. 512.

[46] Sinclair *v.* Brunson, 212 Mich., 387; 12 ALR, 593.

[47] Hurley *v.* Eddingfield, 156 Ind., 416.

In the complaint the death was alleged to have been caused solely from the act of the defendant in refusing to accept and respond to the call,—a difficult allegation to prove. It appears to have been conceded by the plaintiff that *there is no common law liability on the part of the physician to render professional services to all who apply* and therefore, this question was not directly before the court.

Statutes Do Not Require Licentiates to Practice.—The real contention of the plaintiff was that the statute requiring parties who desire to practice medicine to procure a license implied that obligation. The statute in force at the time, provided for a Board of Examiners, standard of qualification, examination of applicants and license to those found qualified, and prescribed penalties for practicing without a license. The court held that the statute is a preventative, not a compulsive, measure; that in obtaining permission from the State to practice medicine, the licensee does not engage that he will practice at all, nor does he promise to render the services on any other terms than he may choose to accept or adopt in each particular case, and that by the fact of issuing a license the State does not require that the licensee shall in fact practice the profession, neither does it stipulate that he must serve all who need him. A license is a privilege, not an obligation.

Civil Rights Acts.—PURPOSES.—The Civil Rights Acts of the various States are intended for the protection of all citizens in their civil and legal rights, their general purport being to entitle all persons within the jurisdiction of the State, regardless of color or race, to the full and equal enjoyment of all the accommodations, advantages, facilities, conveniences and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theatres, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens, irrespective of race, color or previous condition of servitude.[48]

APPLICATION.—The business to which these statutes apply must be of a public character; the statutes do not attempt to control the conduct of the citizen in his private matters, nor to confer equality of social rights or privileges or enforce social intercourse. The only effect of the 13th and 14th amendments to the Federal Constitution, and of the statutes passed in pursuance thereof by Congress and the several States, is to place all citizens on an *equality before the law*.[49]

PHYSICIANS.—These statutes and amendments do not require a practitioner to undertake the relation of physician and patient with a party, regardless of race, color or previous condition of servitude, nor do they attempt to abridge his right to determine with whom he will contract and for whom he will render services. While he may hold himself out to the public as ready to accept as patients all persons presenting themselves for that purpose, still his work, being professional in character and having a large personal equation, is not sufficiently public in its nature to bring it within the provisions of these statutes.

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[48] Baylies *v.* Curry, 128 Ill., 287.

[49] Ganaway *v.* Salt Lake Dramatic Asso., 17 Utah, 37; Civil Rights Act, 1 Hughes (U. S.), 541; Coger *v.* N. W. Union Packet Co., 37 Ia., 145; People *v.* Washington, 36 Cal., 658.

CHAPTER XIV

CIVIL MALPRACTICE

Proof Necessary to Establish Malpractice.—Since injurious consequences, or failure to cure or relieve, ordinarily do not establish either want of skill, default in care or bad judgment, it follows that proof of injurious results or of failure to cure or relieve, is not sufficient to fasten liability upon the professional man. *The mere failure to effect a cure or afford relief, raises no presumption of either ignorance, negligence or poor judgment.*[1] The fact that the patient grew worse under the treatment, and improved when the services were dispensed with, is not of itself sufficient to establish malpractice, as such facts may have been mere coincidences.[2] Mere conjecture or supposition is not sufficient to overcome the presumption in favor of the physician; in fact, mere possibilities cannot establish the probability of a fact requisite to be proved in order to render a party liable in an action for malpractice.

Anesthetic, Refusal to Give.—Failure or refusal to administer an anesthetic is not ground for action for malpractice.[3]

Mistake in Diagnosis.—A mere mistake in diagnosis, not accompanied by improper treatment for the real trouble, will not render the practitioner liable.[4]

Generally speaking, liability for malpractice attaches by reason of improper treatment rather than from any mistaken diagnosis. The patient is not materially concerned in what the practitioner *thinks* his trouble to be, except as his conclusion takes concrete form by treatment for the supposed malady.[5] A wrong diagnosis, not followed by improper treatment and injury to the patient, is not sufficient to predicate an action for malpractice.[6]

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[1] Tifft *v.* Wilcox, 6 Kans., 46.

[2] Wurdenmann *v.* Barnes, 72 Wis., 206; Ely *v.* Wilbur, 49 N. J. L., 685.

[3] Dye *v.* Corbin, 59 W. Va., 266.

[4] Red Cross *v.* Green, 126 Ill. App., 214.

Purpose of the Diagnosis.—Where the sole purpose of the employment is the diagnosis and report of the same, negligence or bad faith in making the examination, resulting in a wrong conclusion and erroneous report, and consequent damages to the patient, constitutes a cause of action.[7]

In the case last cited a young man was engaged to be married but the father of the girl refused his consent because of rumors that the fellow was afflicted with a venereal disease. He denied the charge and agreed with the father to submit to an examination by a physician selected by the father at the latter's expense. The examination was made and the physician erroneously reported that the fellow had such a disease. In consequence, the engagement was broken off and the fellow brought various suits for conspiracy, slander and malpractice against the father, the physician and others. On the trial the suits were consolidated. It was found that the young man was not diseased; that the father and physician acted in good faith and that there was no conspiracy. In the suit for negligence or malpractice against the physician, the supreme court held that having undertaken for compensation, to be paid by another, to examine the plaintiff, and to report whether he was diseased, the defendant was bound to have the ordinary skill and learning of a physician, and to exercise ordinary diligence and care; and if he failed, and the plaintiff was injured because of his want of such skill and learning or his want of such care, the defendant was answerable to him in damages. The fact that the purpose of the examination was information, and not medical treatment, was immaterial. Upon the evidence, it was for the jury to say whether the defendant used ordinary care, learning and diligence.[8]

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[5] Grainger *v.* Still, 187 Mo., 197.

[6] Red Cross *v.* Green, 126 Ill., App., 214; Tomer *v.* Aiken, 126 Ia., 114.

[7] Harriott *v.* Plimpton, 166 Mass., 585.

INQUISITION OF SANITY.—In inquisitions of sanity, the physician who examines the respondent and testifies in the case, is liable to the respondent for any damages he may sustain by reason of a mistake of the physician in his conclusion, if the mistake resulted from carelessness, either in diagnosis or examination of surrounding facts, from the exercise of bad judgment, or from the want of ordinary skill in the premises. Even when the physician is appointed by the court and commissioned to make the examination and give his opinion, he is acting in a ministerial, not a judicial, capacity, and the law holds him to the standard degree of accountability for skill, care and judgment, to the party whose rights are involved, and an error in his opinion arising from his ignorance, negligence, wilfulness or corruption, will make him liable to the respondent for the damage he sustained. His liability is predicated upon the breach of his duty to make an ordinarily skillful and careful examination, and to use his best judgment in forming his opinion therefrom, whereby his conclusion was wrong and injury resulted to the respondent. He is not liable for the false testimony, even though it be perjured, and uttered in malice.[9]

Usual Results Not the Test of Duty.—The patient has a right to expect proper treatment in the light of the advanced state of the science at the time and place, and the fact that the *result* of the treatment was as good as is *usually* obtained in like cases similarly situated, will not excuse the physician for failing to give the patient the full benefit of the chances involved in *proper* treatment.[10]

How Proven.—The method of treatment, what was done and when, how and by whom, and all facts within ordinary observation, may be established by the testimony of ordinary witnesses, but the propriety and skill of the treatment or operation can be proven only by experts on the subject.[11] Whether the treatment in question was in conformity with established principles and usage; whether a surgical operation was performed skillfully; whether a specified diagnosis was proper; whether subsequent disease was due to alleged negligent treatment; whether the treatment conformed to the principles of the school of medicine in question; whether certain results are usual from certain injuries or diseases, are medical questions, and from the very nature of the case, opinion evidence in relation thereto must come from physicians.[12] A physician, however, cannot give his opinion that there was not malpractice, as that is a conclusion of law.[13] Expert opinions cannot be introduced by hearsay.[14]

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[8] Harriott *v.* Plimpton, 166 Mass., 585.

[9] Cooley on Torts, 210.

[10] Burk *v.* Foster, 114 Ky., 20.

Failure to Take X-Ray.—Failure of a physician to take an X-ray of a broken arm does not constitute negligence, even though the physician diagnosed the break as a sprain, where the evidence showed that the diagnosis was made in a careful and proper manner and that the physician acted with ordinary skill and due care in the premises.[15] However, the use of the X-ray in diagnosis has become so general in metropolitan cities and is so effective that, in certain classes of cases, the physician who does not take such precaution when the means are readily available to him, doubtless would and, certainly at this stage in the development of the science, should be made to respond in damages for an injury to his patient for a wrong diagnosis followed by improper treatment, if it should be made to appear that an X-ray would readily have disclosed the true condition and thus have enabled him to avoid the injury to his patient. The physician must use all approved, practical, available, distinctive means to determine the condition of his patient and relieve him of his ailment, and a failure in this respect on his part should spell liability to him for all damages resulting to his patient from such failure.

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[11] Spaulding *v.* Bliss, 83 Mich., 311.
[12] Tifft *v.* Wilcox, 6 Kans., 46.
[13] Hanover *v.* Koch, 84 Ill., 408, 409.
[14] Sims *v.* Moore, 61 Ia., 128.
[15] Wells *v.* Ferry Baker Lumber Company, 57 Wash., 658.

Burden of Proof.—The burden is upon the patient to show by a preponderance of competent evidence,—(a) that the physician was negligent, and (b) that certain injury resulted to him thereby.[16] Patient must prove these facts whether the action be for malpractice or as a defense of, or in recoupment in, an acton by the physician for a fee.[17]

Preponderance of Evidence.—It is not necessary to prove these facts beyond a reasonable doubt nor by evidence sufficient to establish a clear conviction thereof. A preponderance is all that is required.[18] Questions which are susceptible of exact demonstration or absolute determination, are not often the subject of litigation.[19]

Need Not Exclude All Probable Causes.—It is not necessary to exclude every possible cause for the injury, except the negligence of the practitioner, it being sufficient to show that the improper treatment was the probable cause. But the jury is not permitted to determine by mere conjecture between two equally probable causes of the injury complained of, for only one of which the practitioner is responsible.[20] Where the death of a patient might have been caused by the improper administration of an anesthetic by the physician, or calcareous degeneration of the heart, the physician is not liable unless it is made to appear from all the evidence that the death resulted either wholly, or in part, from the improper use or administration of the anesthetic.[21] Where the improper treatment is shown and the inquiry is addressed to the *cause* of the *injury*, the jury is not permitted to conjecture or surmise other causes, but such other causes must be conceded or proved by competent evidence.[22]

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[16] Ewing *v.* Goode, 78 Fed., 442, 443.

[17] Styles *v.* Tyler, 64 Conn., 432; Robinson *v.* Campbell, 47 Ia., 625.

[18] Hoener *v.* Koch, 84 Ill., 408.

[19] Boucher *v.* Larochelle, 74 N. H., 433.

[20] Deschennes *v.* Concord R. Co., 69 N. H., 285.

[21] Yaggle *v.* Allen, 48 N. Y. Supp., 827.

The patient, however, makes out his case, under such circumstances, when he has shown that it is more probable that the cause for which the practitioner was responsible is the one that was the proximate cause of the untoward results.[23]

The burden of proving contributory negligence is on the physician,—he holding the affirmative of the proposition.[24]

Infection Following Treatment.—Proof that an infection followed treatment or operation does not discharge the burden resting upon the patient to establish liability of the practitioner. He must introduce evidence tending to show that the practitioner was to blame and that it is at least probable that the untoward result was due to the improper conduct of the latter, and might not have happened but for such conduct.[25]

Different Schools of Medicine.—*The law recognizes that there are different schools of medicine and it does not favor any particular school.* The treatment adopted by a physician is to be *tested* by the principles and practices of the school to which he belongs and under which he practices. The jury are not authorized to consider the relative merits of the different systems.[26] The word "physician" is not restricted to any particular school.[27] Where an action was brought against an osteopath to recover damages for alleged injuries caused to the patient by reason of his erroneously diagnosing her trouble as dislocation of the hip and treating her for that afflcition, when in fact she was suffering from incipient hip disease, it was shown that hip disease is ascribed to the same cause and diagnosed in the same way by osteopaths and physicians of all schools, and thereupon the plaintiff called several allopathic physicians to testify as to the correctness of the defendant's diagnosis. The court held that such testimony was properly admitted, and said: "The expert medical witnesses offered by the plaintiff were competent to express an opinion as to the diagnosis that was made by the defendant of the plaintiff's trouble, as related by the lay witnesses, to-wit: that she had partial dislocation of the hip-joint, and did not have hip disease, and also competent to testify as to any scientific fact that is, or ought to be, known to every physician of every school and system; but they are not competent to express an opinion as to the treatment of the plaintiff by the defendant, unless it should appear that both the schools to which the witnesses and the defendant belonged employed the same treatment."[28]

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[22] Boucher *v.* Larochelle, 74 N. H., 433.

[23] Boucher *v.* Larochelle, 74 N. H., 433; 15 L. R. A., 416.

[24] Gramm *v.* Boener, 56 Ind., 497.

[25] Ewing *v.* Goode, 78 Fed., 443; Moline *v.* Christie, 180 Ill. App., 334; B. M. Acc. Assn. *v.* Schiefelbusch, 262 Fed., 354.

[26] Bowman *v.* Woods, 1 Greene (Ia.), 441; Force *v.* Gregory, 63 Conn., 167; Nelson *v.* Harrington, 72 Wis., 591.

[27] Raynor *v.* State, 62 Wis., 289; White *v.* Carroll, 42 N. Y., 161; Corsi *v.* Maretzek, 4 E. D. Smith (N. Y.), 1.

In an action against a Chrisian Scientist for malpractice, the propriety and skillfulness of his treatment must be tested by the generally accepted doctrines of his school, and even though such treatment in the particular case is against public policy as announced in the law, still the patient cannot recover for injuries sustained thereby, if the treatment was proper when measured by that standard, and if he knowingly employed the practitioner for that purpose and consented to such treatment.[29] Where the patient is a minor who has not arrived at the age of discretion, a different test should be applied and the practitioner, whatever his belief or religion, should be required to show that his method of treatment was in accordance with enlightened intelligence and the recognized verities of the time, and no maudlin sentiment of religious convictions should be permitted to shield him from responding in damages for the consequences of his folly, or ignorance, or zeal.

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[28] Grainger *v.* Still, 187 Mo., 197; 85 S. W., 1114.

[29] Spead *v.* Tomlinson, 73 N. H., 46.

Where an X-ray was used by a physician to locate a foreign substance in the lungs of a patient, and not in connection with treating the patient for the trouble, a college professor who was familiar with the principles and effects of the rays on the animal organism, and experienced in their use in taking pictures and diagnosing anatomical conditions, was competent to testify as to the proper method of operating the appliances, and that in the case at bar the tube was held too close to the body and that the exposure was too long, thus causing the burns in question. The method of operating the apparatus, the degree of exposure which the patient could stand for diagnostic purposes and the anatomical effect of the rays, could not possibly be affected by the school of practice to which the operator belonged and must necessarily be the same regardless of the school.[30]

Failure to Present Bill, No Admission of Wrong.—In an action for malpractice, the patient cannot show that he has paid nothing for the services and that no bill has been rendered to him or charge made against him by the practitioner, as such failure is not an admission of guilt.[31] However, where the fact that nothing was paid for the services was introduced by the practitioner, it was held harmless under the particular circumstances.[32]

Exhibiting Injury.—In an action for malpractice, the patient may exhibit the injured member to the jury in order that they may determine the nature of the trouble charged to the practitioner, provided the demonstration does not involve indecent exposure.[33]

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[30] Henslin *v.* Wheaton, 91 Minn., 219.

[31] Baird *v.* Gillett, 47 N. Y., 186.

[32] Jones *v.* Angel, 95 Ind., 376.

[33] Lenark *v.* Dougherty, 153 Ill., 163, 165; Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App., 646; Fowler *v.* Sergeant, 1 Grant's Cases (Pa.), 355; Hess *v.* Lowrey, 122 Ind., 225; Freeman *v.* Hutchinson, 15 Ind. App., 639.

When the Relation Begins.—The responsibilities of the relation attach from the very moment of the acceptance of a call by the physician. When a patient comes to the office, the relation ordinarily begins with the commencement of the first diagnosis, however informal it may be, and an unskillful, careless examination resulting in a mistaken recommendation that no treatment or operation is necessary, if it results in injury to the patient, is as much a breach of duty as though it had been followed by improper treatment.

Prompt Response to Call.—If a physician accepts a call, he must respond with reasonable promptness, under the circumstances, and if he defaults therein with resulting injury to his patient, he will be liable for the damages sustained.[34]

When the Relation Ends.—*The relation, once begun, does not terminate until the patient has been discharged or until the physician has been relieved of further responsibility by the patient.* If he quits the case too soon, or, when discharging the patient, fails to give him proper and necessary instruction to enable the patient to get along without his services, he is guilty of a breach of duty. Of course, the physician or patient can always terminate the relation on notice to that effect. When the notice is given by the patient, the relation terminates in accordance therewith and it may be peremptory. If the physician gives the notice at a time when the patient is still in need of medical or surgical attention, the relation will continue for a reasonable time thereafter to enable the patient, with reasonable diligence, to secure another practitioner. Conceding that the relation has ceased, the parties are in the same position as though the relation had never existed, and the physician is not bound to respond to a new call, however urgent, especially when another physician has been on the case in the meantime.[35]

A physician or surgeon who leaves or abandons his patient in a critical stage of disease, without reasonable notice to enable the patient to secure another medical attendant, when the giving of such notice is reasonably possible, is guilty of culpable dereliction to his patient, and if damage result to the patient therefrom he is liable therefor.[36]

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[34] Adams *v.* Henry, 165 Mich., 554.

[35] Tomer *v.* Aiken, 126 Ia., 114; 24 A. C., 833.

Malpractice is a Question of Law.—The question as to what is the proper degree of skill and care required of a practitioner is a *question of law,* for the court to determine and announce.[37] But the question as to whether or not these *requirements* were *present* in the particular case, is a *question of fact* for the jury to determine.[38] In other words, it is for the jury to say, from all the evidence, whether or not the treatment amounted to negligence, under the rule of skill, care and judgment required by the law.[39]

Physician Ordering Patient to Hospital.—Ordinarily a physician has no authority to order the removal of his patient to a hospital, but, of course, he may recommend such disposal, and will not be liable for damages unless negligence on his part, causing the same, is shown.[40]

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[36] Stohlman *v.* Davis (Neb.), 220 N. W. 247; 60 ALR, 664.

[37] Link *v.* Sheldon, 136 N. Y., 1.

[38] Harriott *v.* Plimpton, 166 Mass., 585; Langford *v.* Jones, 18 Ore., 307; Olmstead *v.* Gere, 100 Pa., 127.

[39] Van Hooser *v.* Berghoff, 90 Mo., 487; Hewitt *v.* Eisenbart, 36 Neb., 794; Tifft *v.* Wilcox, 6 Kans., 46; Carpenter *v.* Blake, 60 N. Y., 488.

[40] Medlin *v.* Bloom, 230 Mass., 201.

CHAPTER XV

CIVIL MALPRACTICE

Defenses

Proper Treatment.—In defense of an action for malpractice, the practitioner is entitled to show by expert evidence that the treatment given was such as a practitioner of ordinary skill, care and good judgment, would and ought to have given.[1]

Former Judgment for Physician.—On the trial of an action for malpractice against a physician, he may show that he previously brought suit to recover his fee and obtained a judgment, although defended by the present plaintiff on the ground of malpractice. In some states such judgment is a bar to the subsequent action.[2] However, if the patient did not appear and defend the suit for fee but permitted the judgment to be entered by default, it has been held that he is not debarred his right of action for malpractice.[3] The courts are not in unison on the effect of judgments for fees on subsequent action for malpractice with reference to the same services.[4]

Injury from Other Causes.—The physician may show that the injury came, or might with equal likelihood have come, from other causes than his malpractice, and if the evidence leaves it uncertain whether the untoward results complained of arose from the default of the practitioner or from other causes, the patient cannot recover in an action for malpractice nor defeat an action by the physician for his fee, because the law indulges no presumption against the latter.[5]

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[1] Quinn *v.* Higgins, 63 Wis., 664.

[2] Howell *v.* Goodrich, 69 Ill., 556; Blair *v.* Bartlett, 75 N. Y., 150; Hydrick *v.* Ry. Co., L. R. A. 1916 B, 742.

[3] Lawson *v.* Conaway, 37 W. Va., 159; Barlow *v.* Southwick, 258 Ill. 515.

[4] Jordahl *v.* Berry, 72 Minn., 119; 45 L. R. A. (O. S.), 541.

Reputation.—Skill and competency are not put in issue by a general or specific charge of negligence in the treatment of a patient, and therefore testimony of general reputation as to skill is not admissible under such an issue.[6]

One Suit—One Recovery.—The law does not permit a multiplicity of suits for one cause of action, but requires the plaintiff to prove his entire damage, present and prospective, in his first case. Hence, a patient cannot bring successive suits, from time to time as his loss may accrue, for malpractice, but he is required to prove his entire damage in the first action, and if he fails to do so he must bear the loss.[7] The case just cited was an action against a physician for malpractice in setting a fractured arm of plaintiff's son. It appeared that prior to the commencement of the suit the physician brought an action against the plaintiff to recover his fee for the same services; that the plaintiff defended on the ground of malpractice and that on the trial the physician recovered the full amount of his claim. Held, that adjudication in the suit for the fee was a bar to a recovery for the alleged malpractice.

Mistake Caused by Patient.—A patient cannot recover for injuries resulting from a mistake into which he himself led the physician, unless the conduct of the latter was inconsistent with ordinary and reasonable skill and care.[8]

Damages

Kinds.—Damages are three in kind,—(a) *Nominal,* (b) *Compensatory,* and (c) *Punitive.*

Nominal damages are a trifling sum awarded when a breach of duty or an infraction of a right of the plaintiff is shown, but no serious loss is proven to have been sustained, or where, from the nature of the case, some injury has been done, the amount of which the proofs fail to show with sufficient certainty, or not at all, or cannot be shown. Nominal damages are "a peg to hang costs upon." They arise by implication of law by reason of a breach of duty.[9]

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[5] Boucher *v.* Larochelle, 74 N. H., 433.

[6] Holtzman *v.* Hoy, 118 Ill. 534; Green *v.* Shaw, 48 ALR, 243.

[7] Howell *v.* Goodrich, 69 Ill., 556.

[8] Park *v.* Adams, 12 Metc., 417; Clark *v.* Keriom, 4 E. D. Smith, 21.

Compensatory damages are such as will compensate the wronged party for the injury he has sustained and nothing more. They proceed from a sense of natural justice and end at the point where the injury has been repaired.[10]

Exemplary or Punitive or Vindictive damages are those given in addition to compensation for a loss sustained, in order to punish and make an example of the wrongdoer. They are allowed where a tort is aggravated by evil motives, actual malice, deliberate violence, oppression or fraud, or where the party acts willfully or with such gross negligence as to indicate a disregard of the rights of the other.[11] The purpose and intent of such damages are to punish the offender and furnish an example of the dangers consequent on such misconduct.[12] In an action by a patient against a physician for malpractice, punitive damages cannot be recovered unless the act or omission constituting the basis of the claim amounts to a tort.[13]

While there is a maxim of law older than our language—*De minimus non curat lex*—the law does not concern itself with trifles—still, if, as a matter of substantial right, a party is entitled to nominal damages, carrying costs of suit, and the jury wrongly finds in favor of his adversary, a new trial should be allowed him on motion, or if judgment has been entered against him for costs, it should be set aside and a new trial granted; but the maxim usually applies in such cases and appellate courts will not interfere.[14]

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[9] Stanton *v.* R. Co., 59 Conn., 272; Maher *v.* Wilson, 139 Cal., 514; W. U. T. Co. *v.* Lawson, 66 Kan., 660; Sellers *v.* Mann., 113 Ga., 643.

[10] McKnight *v.* Dessny, 198 Pa., 323; Sachra *v.* Massilla, 120 Ia., 562; Navigation Co. *v.* U. S., 148 U. S., 312; Reid *v.* Terwilliger, 116 N. Y., 530.

[11] Con. Coal Co. *v.* Haenni, 146 Ill., 614, 628.

[12] Garrick *v.* R. Co., 53 S. C., 448.

[13] Hood *v.* Moffatt, 109 Miss., 757; A. C. 1917 E, 410; 17 C. J. 977; 8 R. C. L., 604.

Presumptions.—It is to be assumed that every physical endownment, function and capacity is of importance in the life of every man and woman and that occasion will arise for the exercise of each and all of them, and to the extent to which any function is destroyed or its discharge rendered painful or perilous by the wrongful infliction of personal injury, the party complainant is entitled to damages. We can, in other words, conceive of no physical injury wrongfully inflicted, whether entailing pain only, or disfigurement or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate for compensation in damages.[15]

Amount Recoverable.—*In actions for injuries from malpractice, there is no criterion or fixed standard of measurement of amount or damages.*

Elements of Damages.—In assessing damages for malpractice the court or jury should take into consideration the pain and suffering incident to the wrongful treatment, loss of time, loss of health, increased delay in effecting a cure and the probability of permanent injury necessarily or reasonably consequent on the injury sustained by the maltreatment.[16] To establish the amount of his damages the patient may show his pecuniary loss direct or indirect, impaired earning capacity, loss of time and its value, actual expenses incurred and pain and suffering, even up to the time of trial, any disfigurement of person resulting from the malpractice, permanency of the injury resulting therefrom, and the station and condition in life of the patient, mental worry, anxiety, discomfort, mortification and chagrin, by reason of the injury from the malpractice.[17] The correct measure of damages for injury caused by carelessness or unskillful treatment by a physician is reasonable compensation for the bodily pain and metal suffering, if any, endured by the patient, and the impairment of the patient's ability to earn money and his loss of time, if any, occasioned by the negligence of the physician, and where the act is also willful or the negligence gross, exemplary damages may be assessed.[18]

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[14] Stevens *v.* Yale, 113 Mich., 580; Fisher *v.* Hopkins, 85 Ill. App., 207; 5 A. C., 223, 225.

[15] Alabama R. Co. *v.* Hill, 93 Ala., 514, 515.

[16] McCracken *v.* Smeathers, 122 N. C., 799.

[17] Chamberlain *v.* Porter, 9 Minn., 244; Tifft *v.* Wilcox, 6 Kans., 46; Cody *v.* Weins, 1 Mont., 424; Coombs *v.* King, 107 Me., 376, 380.

Patient's Duty to Prevent Aggravation of Injury.—It is a general rule of law that a person who is injured by the fault of another must use all reasonable means to protect himself against aggravation of the injury and cannot recover for any suffering or physical disability which, under the circumstances, could have been prevented by the use of reasonable precaution and attention in caring for the injury.[19] But this doctrine can have but little bearing in a case of malpractice, because the patient is usually justified in assuming that he is already receiving proper medical and surgical attention. The general rule requires that a person who is suffering from an injury must use reasonable diligence to employ a physician of skill to treat him, where treatment is reasonably necessary, and if he employs a skillful physician, the law regards an injury resulting from the mistakes of such physician, or from the failure of the means employed by him to effect a cure, as a part of the immediate and direct damages flowing from the original injury.[20] However, the reason for the rule does not apply in cases of patient and physician; hence, a patient is not bound to seek the aid of other practitioners to mitigate the consequence of the mistakes of his attending physician as long as the relation exists.[21]

Reduce Damages—Surgical Aid.—Where an injured party is intitled to compensation under the Workmen's Compensation Act of Massachusetts, he cannot claim compensation for existing disability or suffering which could have been lessened by resort to the reasonable remedies and operations of the medical and surgical practice of the time and place, provided these are not attended with serious risk to life or member, and the outcome reasonably to be expected will be beneficial. If the claimant is not to be subjected to unusual risk and danger arising from the anesthetic to be employed, or from the nature of the proposed operation, or from both, it is the duty of the claimant to submit to the operation, if it fairly appears that the result thereof will be a substantial physical gain. Whether in a particular case there is such risk and danger, and whether it fairly appears that a substantial gain will result from a suggested operation are generally questions of fact to be determined by the tribunal.[22]

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[18] Dorris *v.* Warford, 124 Ky., 768; Alabama R. Co. *v.* Hill, 93 Ala. 514.

[19] Murphy *v.* S. P. Co., 31 Nev., 120 134; Osborne *v.* Detroit, 32 Fed., 36; 21 A. C., 502, 513.

[20] Variety Mfg. Co. *v.* Landaker, 227 Ill., 22, 25.

[21] Chamberlain *v.* Morgan, 68 Pa., 168.

In the case just cited two experts testified that the outcome of the suggested operation was uncertain. In their opinion the benefit was probable and there was a chance of great improvement, but the operation was considered a major operation and a good result could not be positively promised, and the court held that the claimant was justified in refusing to submit to the operation.

Mere Contingencies.—Consequences which are contingent, speculative or merely possible are not proper to be considered in assessing damages. It is not enough that the injuries received *may* develop into more serious conditions than those which are visible at the time of the trial, or even that they are *likely* so to develop. To entitle the plaintiff to recover present damages for apprehended future consequences, there must be such a *degree of probability* of their occurring as amounts to a *reasonable certainty* that they will result from the original injury.[23] Therefore, physicians will not be permitted to testify that certain specified results *sometimes* follow a specified injury.[24]

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[22] Re: Snook (Mass.) 161 N. E., 892.
[23] McLain *v.* R. C., 116 N. Y., 460, 467.
[24] Blate *v.* R. Co., 44 N. Y. Supp., 615; Fry *v.* R. Co., 45 Ia., 416.

Cannot Recover for Original Injury or Disease.—The damages which a patient may recover are those growing out of the injury resulting from the negligence, but not for any loss sustained by reason of the original disease or condition.

Mitigation.—Where a physician is sued for malpractice resulting in the death of his patient, he may show that the nature of the patient's disease was of such character that he would have died soon in any event. Though not a bar, such fact goes to mitigation of the damages.[25]

Aggravation.—The fact that the consequences of a surgeon's negligence in performing an operation are aggravated by the physical condition of the patient does not preclude the latter from recovering his full damages therefor.[26]

Excessive Damages.—In an action for malpractice, a verdict for the patient will not be set aside on the ground that the damages found are excessive, unless it appears that the jury was influenced by passion, prejudice or other improper motive.[27] An Illinois court considered that a judgment for three thousand dollars was not excessive in a malpractice case, where the defendant, while claiming to put in artificial teeth without plate or bridge work, placed in the plaintiff's mouth heavy bridge work by what was pretended to be a secret process, and in so doing filed, ground, broke and loosened plaintiff's teeth and produced other damage to her mouth. The case contained an element of fraud and deceit, and the court held that there was evidence to support such a charge, and these facts should be taken into consideration in accepting the case as an example, since it appears from the report of the case that the damages allowed were more than compensatory.[28] A verdict for $500 was held not excessive in an action against a dentist for negligence in allowing a tooth to fall into the patient's windpipe during the operation of extraction.[29]

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[25] Chase *v.* Nelson, 39 Ill. App., 53.

[26] McCormick *v.* Jones, 152 Wash., 508; 65 ARL, 1019.

[27] Chamberlain *v.* Porter, 9 Minn., 260; Kelsey *v.* Hay, 84 Ind., 189.

[28] Prout *v.* Martin, 160 Ill. App., 11.

Form of Action.—A suit for malpractice is a civil action. Such actions are almost invariably in tort, that is, *ex delicto* in character. However, a practitioner may make a special contract with his patient for special skill and care, for violation of which he will be liable in contract; but where the action is for a breach of the obligation imposed by law as a matter of public necessity and policy, it is in the nature of tort and not in contract.[30] Nevertheless, "if the defendant made a contract with the plaintiff to treat him and his family, as alleged in the petition . . . and simply broke the contract by refusing to come when sent for . . . the right of action would be simply for the breach of the contract, and there would be no right of action in tort. But if the physician came and undertook the case and, having undertaken it, was negligent in his treatment, then a cause of action in tort may be maintained for the non-performance of the duty which the law cast upon him when he undertook to treat the case." [31] A practitioner who accepts but fails to respond to a call cannot be said to be guilty of malpractice, and, if the patient is damaged, his action ought to sound in contract.[32] But even in such case, the question might arise as to whether the delay in responding was due to refusal to call at all, or to negligence in determining when to make the visit. Some courts hold that in any case the patient may waive the tort and sue in contract.[33] And the law of contracts with reference to limitations and survival of right of action applies.[34] Where the patient sues for the breach of a special agreement his action is in contract.[35]

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[29] Keily *v.* Colton, 1 City Ct. (N. Y.), 439.

[30] Carpenter *v.* Walker, 170 Ala., 659; 25 A. C., 866.

[31] Randolph *v.* Snyder, 139 Ky., 159.

[32] *See* Adams *v.* Henry, 165 Mich., 554; 24 A. C., 829.

[33] Lane *v.* Boicourt, 128 Ind., 420.

[34] Staley *v.* Jameson, 46 Ind., 156; Long *v.* Morrison, 14 Ind., 595; Goble *v.* Dillon, 86 Ind., 327.

[35] Burns *v.* Barenfield, 84 Ind., 43.

Reasons for Alleging Contract.—In actions of malpractice the usual allegations of employment of the practitioner by the patient are mere matters of inducement to show the *relation existing between the parties* and, inferentially, the obligation imposed by law on the practitioner by reason thereof.

Death from Malpractice.—*At common law* no action lies for damages caused by the death of a human being, by the wrongful or negligent act of another, in favor of the heirs, distributees or personal representatives of the decedent.[36] But in 1846 the British Parliament passed a statute, "That whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereto, then and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured and, although the death shall have been caused under such circumstances as amount, in law, to a felony." The act then provides that the suit shall be brought for the benefit of the wife, husband, parent and child of the deceased in the name of the personal representative of the deceased. This statute has been enacted, with slight modifications and additions, in all the States of the United States, and in all countries which follow English jurisprudence, and wherever such a statute is in force a practitioner is liable for all damages sustained by the beneficiaries named in the statute, in case the death of his patient results from his malpractice.

Damages.—In these cases, where the beneficiaries are lineal kindred of the deceased, the damages which are recoverable are usually limited to the pecuniary loss sustained by such beneficiaries.[37]

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[36] Holton *v.* Daly, 106 Ill., 131, 136.

[37] Chicago, etc. *v.* Kelly, 182 Ill., 267.

Joint and Several Actions.—Where two or more physicians are jointly guilty of malpractice, suit may be brought by the patient against all jointly, or one, or any number less than all, at the option of the patient, or separate actions may be brought against all, or any number less than all.[38] One practitioner, however, is not liable for an injury inflicted by another, unless they were partners or acted in concert or co-operation, and several will not be liable for the torts of one unless they concerted or co-operated in the negligent act, or unless their combined, co-operating conduct produced the resultant injury.

Joint Services—Joint Liability.—A physician jointly employed with another to treat a patient and to render joint services cannot relieve himself of responsibility for negligent treatment by simply staying away without notice to the patient; that is to say, if two persons owe the same duty and their acts tend to the same breach of duty, the wrong may be regarded as joint and both may be held liable; as where two physicians diagnosed a broken femur as a contusion and treated the patient for that condition, although the leg was perceptibly shortened and the foot everted· These facts were considered sufficient to take the question of the negligence of both physicians to the jury.[39]

Independent Acts.—Where the acts of the practitioners are entirely distinct and separate as to aid, concert, advice, co-operation or countenance, one to the other, there can be no joint liability and each will be liable only for his own wrong.[40]

On a charge of malpractice for negligently treating a wound, whereby it became infected resulting in the death of the patient, the physician cannot be joined in the same action with the party whose negligence is alleged to have inflicted the wound.[41]

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[38] Barnes *v.* Means, 82 Ill., 378; Yeazel *v.* Alexander, 58 Ill., 254, 261; Chicago *v.* Babcock, 143 Ill., 358, 366.

[39] Bowles *v.* Kinton (Colo.) 56 ALR, 814, 818.

[40] Yeazel *v.* Alexander, 58 Ill., 254, 262.

[41] Ader *v.* Blau, 241 N. Y. 148; 41 ALR, 1216.

Physician and Druggist.—The physician who writes a prescription and carelessly inserts a deadly drug, or too large proportion thereof, in view of the prescribed dose, and the druggist who compounds it with knowledge of the use to which it is to be put, are jointly and severally liable to the patient for injurious consequences, or to the proper representative on the death of the patient as a result of taking the medicine.[42]

Assistant to Surgeon.—Where the family physician was present at an operation and assisted the operating surgeon in minor ways but did not exercise any discretion as to the operation, and did not have anything to do with the handling of sponges or gauze, he was not jointly liable with the operator who carelessly left gauze in the abdominal cavity after closing the wound.[43]

Contribution.—Where a patient sues only one practitioner, or any number less than all who are jointly guilty of malpractice, those sued cannot require the others to be made parties to the suit nor to contribute to the payment of the judgment.[44] When an action is founded upon contract all parties liable are required to contribute their *pro rata* share.

Satisfaction.—In cases of this character, a patient can have but one satisfaction of his damages. If, for a sufficient consideration, he releases one of the joint wrongdoers, he releases all and, if a judgment against one is satisfied, it bars a prosecution of the others, or a collection on judgments against the others.[45]

Agreement Not to Sue.—An agreement not to sue is not considered an accord and satisfaction, does not amount to a release and, therefore, if given to one or more joint wrongdoers, for a sufficient consideration, does not bar action against other joint wrongdoers.[46]

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[42] Sutton *v.* Wood, 120 Ky., 23; 8 A. C., 894; Tumblay *v.* Kimball, 24 A. C., 1215, 1219; Murdock *v.* Walker, 43 Ill. App., 590; 31 ALR, 1333.

[43] Brown *v.* Bennett, 157 Mich., 654.

[44] Rend *v.* R. R. Co., 8 Ill. App., 517, 525; Reed *v.* Peterson, 91 Ill., 288, 297.

[45] Vigeant *v.* Scully, 35 Ill. App., 44, 47.

Survival of Action.—In the absence of statutory provisions to the contrary, a right of action for malpractice does not survive the death of either patient or practitioner, and if suit has been brought, it abates upon the death of either.[47]

However, if a partner, who is guilty of malpractice, dies, the right of action survives against the surviving partner, whether the latter contributed to the malpractice or not.[48]

Release.—A release by an employe of an employer for damages for injuries received by the former, has been held to amount to a release of a physician for malpractice in treating the injury, where the damages could not be readily allocated, as between the original injury and the malpractice.[49]

In cases where the facts are such that a wrongdoer is liable for injuries which result from or are aggravated by subsequent malpractice by a physician, a release of the wrongdoer from all claims and demands growing out of the injury will release the physician, and, in view of the basis of the liability of the wrongdoer, it would appear that the release of the negligent physician would amount to a release of the party causing the primary injury.[50]

This rule applies whether the party released was in fact liable or not. The effect and validity of the release does not depend upon the validity of the cause of action against the releasee. The injured party is charged in law to know of his right of action against the other party claiming the benefit of the release.[51]

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[46] Chicago *v.* Smith, 95 Ill. App., 335, 339.

[47] Vittum *v.* Gilman, 48 N. H., 416; Boor *v.* Lowrey, 103 Ind., 468; Wolf *v.* Wall, 40 O. St., 111; Lattimore *v.* Simmons, 13 S. & R., 183.

[48] Hess *v.* Lowrey, 122 Ind., 225.

[49] Martin *v.* Cunningham, L. R. A., 1918–A, 225.

[50] Retelle *v.* Sullivan, 191 Wis., 576; 50 ALR, 1106.

[51] Retelle *v.* Sullivan, 191 Wis., 576; 50 ALR, 1108.

CHAPTER XVI

CRIMINAL MALPRACTICE

Criminal Malpractice consists in doing acts (a) which show a reckless disregard of human life or (b) which are expressly forbidden by statutes or (c) which are denounced by the common law, on the part of a physician in treating a patient, by means of which the patient suffers death or unnecessary injury.[1]

Criminal Liability.—*In case of gross negligence of a physician, resulting in the death of his patient, he may be guilty of manslaughter.*[2] A person assuming to treat diseases is bound to know the nature of the remedies he prescribes and the treatment he adopts, and he is responsible criminally for a death resulting to a patient from gross ignorance and culpable negligence in the selection of remedies and in the application of the treatment.[3] In order to sustain the action, gross incompetency or reckless inattention or indifference must be shown. An inadvertent mistake, a mere error of judgment, an inability to master unforseen conditions will not be sufficient to predicate such liability.[4] In case of criminal negligence, where death does not result, the practitioner will be guilty of a misdemeanor.[5] The real intent of the physician is immaterial. He is presumed to intend the reasonable and probable consequences of his acts.[6] Thus, in England, a physician has been held criminally liable where corrosive sublimate was applied as a remedy for cancer and as an emetic to remove mercury from the system, and where other dangerous and deadly medicines, as arsenic and lobelia, were administered by one ignorant or careless of their effects. Mere error of judgment does not constitute criminal carelessness. Reckless failure to give proper instructions to a patient as to the use of a dangerous drug, gross ignorance of the proper use of instruments or of the effects of dangerous remedies employed and the selection and application thereof may constitute criminal malpractice.[7] It has been held that an excessive exposure to X-rays in taking a photograph or for other purposes, with the light too close to the subject, and failure to give attention requisite to prevent injury, imports criminal negligence.[8]

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[1] Tucker *v.* Gillett, 22 O. Cir. Ct., 664, 669.

[2] State *v.* Reynolds, 42 Kan., 320.

[3] Barrow *v.* State,—Okla.,—; 9 ALR, 207, note 211.

[4] Com. *v.* Pierce, 138 Mass., 165.

[5] State *v.* Reynolds, 42 Kan., 320; Hyatt *v.* Adams, 16 Mich., 198.

[6] Rex *v.* Simpson, 4 C. & P., 398; Stehr *v.* State, 92 Neb., 755.

Abortion.—*Abortion is the act of miscarrying or producing young before the natural time;* before the fœtus is perfectly formed or able to sustain life. Therefore to cause, procure or produce this premature bringing forth of the fœtus is to cause, procure or produce an abortion. In law, abortion and miscarriage are synonymous.[9]

Criminal Abortion is the bringing about, without legal justification, the expulsions of the human fœtus at a premature period of uterogestation before it has acquired the power of sustaining an independent existence.[10]

At Common Law.—Abortion as a crime is to be found only in modern treaties and modern statutes. No trace of it is to be found in the ancient common-law writers.[11] However, the courts of this country are not agreed as to the nature of this act at common law. In a number of the states there are decisions to the effect that "to produce an abortion on a woman *before she is quick with child and with her consent*" is not to commit the common law crime of abortion. On the other hand, it has been judicially declared in Pennsylvania that "It is a flagrant crime at common law to attempt to produce the miscarriage or abortion of a woman, because it interferes with and violates the mysteries of nature in the process of which the human race is propagated and continued. It is a crime against nature which obstructs the fountains of life and therefore it is punished. . . . It is not the murder of a living child which constitutes the offense of abortion, but the destruction of gestation by wicked means and against nature. . . . The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated."[12] It is perfectly certain, by the unanimous concurrence of all the authorities, that at common law, the offense could not have been committed unless the child had quickened. This seems to be the reasonable and just doctrine.[13]

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[7] 29 C. J., 1158.

[8] State *v.* Lester, 127 Minn., 282; 13 ALR, 1419.

[9] People *v.* Heisler, 300 Ill., 98; I. C. J., 309.

[10] People *v.* Heisler, 300 Ill., 98.

[11] State *v.* Cooper, 22 N. J. L., 52.

Attempt.—The law prohibits not only abortion when without legal justification but also the *attempt* to abort when not legally necessary.

Intent.—*Intent* to produce a miscarriage, without legal excuse, is a necessary element of the offense; hence to assault and beat, in anger, a pregnant woman, thereby causing her to abort, does not constitute the crime of abortion.[14] Intent may appear manifest from the character of the means employed; it must be shown by the circumstances and it will be presumed if the statutory elements of the offense are present.[15] Where a physician attended a woman in premature confinement, to which he in no way contributed, and removed the fœtus by force, he was held not liable criminally under the provisions of the statute of Illinois.[16] That the defendant was the father of the child is competent evidence to show a motive for an attempt to produce an abortion.[17]

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[12] Mills *v.* Com., 13 Pa. St., 630.

[13] State *v.* Slagle, 83 N. C., 630; People *v.* Sessions, 58 Mich., 594; Smith *v.* Gafford, 31 Ala., 45; State *v.* Atwood, 54 Ont., 526 21 A. C., 516, 522.

[14] Slattery *v.* People, 76 Ill., 217.

[15] State *v.* Glass, 5 Ore., 73.

[16] Hounard *v.* People, 77 Ill., 481.

[17] Scott v. People, 141 Ill., 195.

Without the Woman's Consent.—The use of violence upon a pregnant woman, with intent to produce a miscarriage, even before quickening, without her consent, is an assault highly aggravated by such wicked purpose and is indictable at common law.[18] Of course, the consent of the woman does not relieve the act of its criminality under the statutes or at common law.[19]

Knowledge of Pregnancy.—An intent to commit an abortion may exist without an absolute knowledge of pregnancy.[20]

Pregnancy Not Necessary to Attempt.—Under some statutes which do not specify a pregnant woman, an attempt to cause abortion may be committed on a woman, even though she is in fact not pregnant. The offense is considered complete when the *overt act* is committed with the *specific criminal intent.*[21]

Means Employed.—Where the intent to commit an abortion exists, the means employed are usually not material. Thus, where a party has a pregnant woman under his control and induces her to indulge in excessive and violent exercise with the intent thereby to produce an abortion, and such result follows, he is guilty of the offense.[22]

Failure to Produce.—The fact that the efforts of the defendant were barren of results and the contemplated miscarriage was not effected, has no bearing upon the guilt of the accused when charged with an attempt to abort, since the actual abortion is not necessary to the consummation of the offense.[23]

Advice to Procure.—Ordinarily, mere advice to a pregnant woman to take medicine to bring about a miscarriage, or to undergo an operation for that purpose, without any overt act or assistance, will not render the advisor guilty of the offense denounced by the statute.[24] However, owing to the language of some statutes, mere advice and information are considered as completing the offense of attempt, without any overt act.[25]

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[18] Com. *v.* Parker, 9 Metc. (Mass.), 263; Smith *v.* State, 33 Me., 48; State *v.* Cooper, 22 N. J. L., 52.

[19] State *v.* Moore, 25 Ia., 128; Com. *v.* Snow, 116 Mass., 47.

[20] Powe *v.* State, 48 N. J. L., 34.

[21] Powe *v.* State, 48 N. J. L., 34; Com. *v.* Surles, 165 Mass., 59; Eggart *v.* State, 40 Fla., 527.

[22] 1 C. J. 311.

[23] Smith *v.* State, 33 Me., 48; Willingham *v.* State, 33 Tex. Crim., 98; State *v.* Owens, 22 Minn., 238.

Proof of Pregnancy.—Where the statute designates a pregnant woman or a woman pregnant with child, the pregnancy of the woman in question must be proven beyond a reasonable doubt, but not with absolute certainty,—such reasonable certainty as shall silence all reasonable doubt is sufficient.[26] If the pregnancy is admitted and the defense offered is that the fœtus was dead at the time of the operation, the burden is upon the defendant to introduce some evidence to establish that fact, on the ground that life once existing is presumed to continue.[27]

Stage of Pregnancy.—Where the statutes make pregnancy of the woman an ingredient of the offense, without specifying the stage of gestation, the crime may be committed at any time after conception and before complete paturition.[28]

Period of Pregnancy.—Pregnancy begins with conception and ceases when the fœtus has come forth from the womb, even though it is still attached by the umbilical cord, and though the afterbirth has not been removed.[29]

Fact of Pregnancy.—Pregnancy may be shown by conduct, statements and probative circumstances,[30] and it need not be proven that the fœtus was alive at the time and in the course of nature would have matured into a human being.[31] If the fœtus was dead, such fact is a defense.

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[24] People *v.* Phelps, 133 N. Y., 267.

[25] State *v.* Murphy, 27 N. J. L., 112.

[26] State *v.* Stafford, 145 Ia., 285; Fitch *v.* People, 45 Colo., 298; State *v.* Lilly, 47 W. Va., 496.

[27] Com. *v.* Reid, 8 Phila. (Pa.), 385, 400.

[28] State *v.* Fitzgerald, 49 Ia., 260.

[29] Com. *v.* Brown, 14 Gray (Mass.), 415.

[30] State *v.* Alcorn, 7 Idaho, 599.

[31] Com. *v.* Surles, 165 Mass., 59.

Evidence.—The mere fact that treatment was followed by expulsion of the fœtus, does not establish the offense, but is a fact to be taken into consideration. A denial by the woman that she had been criminally aborted will not defeat a prosecution, and often is entitled to but little consideration in the light of other facts and circumstances. However, she is not usually considered an accomplice.[32]

RES GESTÆ.—Letters, statements and conduct of the woman so closely connected in time and substance with the facts and conduct alleged to be a part of the *res gestæ,* are admissible in a prosecution of a physician for causing the abortion.[33]

CIRCUMSTANTIAL EVIDENCE.—The evidence in abortion cases is almost exclusively circumstantial, and the question of admissibility of collateral facts is often determined by the nature of the case under consideration. The tendency is to permit the evidence to cover a wide range of subjects and to admit in evidence any fact which has a bearing on any issue in the case.[34] It is proper to show that the physician accused held himself out as able and willing to assist women in producing miscarriages, when evidence has been introduced tending to show the commission of the offense, or where the physician admits the act and attempts to justify it on the ground of necessity, because such holding out tends to show his *intent* and characterizes the act.[35]

OPINION EVIDENCE.—The opinions of medical experts are admissible to prove that an abortion had been performed on a woman, the nature and effect of drugs, treatments and instruments, the stage to which pregnancy had advanced at the time of the expulsion, and other pertinent matters of a medical character. But the opinion of the woman as to the effect of the drugs taken or treatments administered is not admissible.[36] Of course, she can testify as to what followed the treatment or administrations, but she cannot state that such conditions were the result of the treatment or operation.[37]

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[32] People *v.* Vedder, 98 N. Y., 630; Com. *v.* Boynton, 116 Mass., 343; Smart *v.* State, 112 Tenn., 539; State *v.* Smith, 99 Ia., 26; Seifert *v.* State, 160 Ind., 464.

[33] State *v.* Dickinson, 41 Wis., 299; Solander *v.* People, 2 Colo., 48; State *v.* Ryder, 80 Vt., 422.

[34] Clark *v.* People, 224 Ill., 554, 562; People *v.* McGonegal, 136 N. Y., 62; Diehl *v.* State, 157 Ind., 549.

[35] Clark *v.* People, 224 Ill., 554; People *v.* Sessions, 58 Mich., 594; Clark *v.* Com., 111 Ky., 443.

Statutes.—This subject is now regulated by statute. With the policy of the law, the physician, as such, is not concerned. The statute fixes the policy of the state in the matter, and until it is changed in the orderly processes of government under the constitution, the practitioner must obey its mandates. The same general purpose is aimed at by all legislation and the provisions of the law in the various states are substantially similar. The statute of Illinois may be taken as an illustration of the spirit of such laws. It provides that whoever, by means of any instrument, medicine, drug or other means whatever, causes any woman, pregnant with child, to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder. This statute creates two separate and distinct offenses, namely, (a) procuring an abortion, and (b) attempting to procure an abortion.

Necessary to Save the Mother's Life.—All statutes except from their prohibition cases *when premature delivery is necessary to save the mother's life,* the exception being expressed in slightly varying language in different states. Ordinarily the burden is on the defendant to show that his act comes within the exception to a statute. However, in cases of abortion, where the statute excepts cases necessary to save the mother's life, the majority of the courts hold that the burden is on the prosecution to prove the absence of such necessity for the operation.[38] Even if the exception did not appear in the statute, doubtless the existence of the fact that the operation was necessary to save the mother's life, would completely exonerate the physician and relieve him of criminal liability in performing the operation but the burden of proving such fact would be upon him.[39]

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[36] State *v.* Baldwin, 79 Ia., 714; King *v.* State, 35 Tex. Crim., 472.

[37] Navarro *v.* State, 24 Tex. App., 378; People *v.* Olmstead, 30 Mich., 431.

NECESSITY.—The necessity mentioned in the various statutes, and which as a matter of common law will justify the operation, is intended to cover only those cases where the death of the mother might reasonably be expected to result from natural causes, growing out of or aggravated by the pregnancy, unless the child is destroyed. Of course it need not appear that the death of the mother is *inevitable and at hand* in the absence of the operation.[40] However, the fact that the woman has threatened to commit suicide unless relieved of her child is not such a necessity as the statutes contemplate or the common law would recognize. The threatened death must be the natural and apparent result of existing conditions.[41] A desire to shield the woman from ignominy and disgrace does not bring the case within the exception, nor relieve the act of criminality.[42]

ADVICE OF PHYSICIAN.—Where a physician after proper examination, in good faith, concludes that an operation is necessary to save the life of the mother or child, and his diagnosis and prognosis are concurred in by other physicians, after independent investigation, he is justified in acting, even though the statute makes no provision for determining when the necessity exists, or even does not except such cases.[43] The mere *belief* of the operator that abortion is necessary, however conclusively established, is not sufficient; the necessity must exist as a matter of *fact*,[44] and such conditions must be shown as reasonably to justify such belief.

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[38] State *v.* Lee, 69 Conn., 186; State *v.* Aiken, 109 Ia., 643; State *v.* Clements, 15 Ore., 237; Moody *v.* State, 17 O. St., 110; State *v.* Meek, 70 Mo., 355; Hatchard *v.* State, 79 Wis., 357.

[39] State *v.* Fitzporter, 93 Mo., 390; Bassett *v.* State, 41 Ind., 303; State *v.* Clements, 15 Me., 237; State *v.* Stokes, 54 Vt., 179.

[40] Beasley *v.* People, 89 Ill., 571.

[41] Hatchard *v.* State, 79 Wis., 357.

[42] Com. *v.* Wood, 11 Gray (Mass.), 85; Com. *v.* Snow, 116 Mass., 47.

Civil Liability.—The consent by a person to allow another to perform an unlawful act upon him does not constitute a defense to an action by the party to recover actual damages which such person thereby received. This proposition is especially applicable in cases where a woman consents to the performance of a criminal abortion upon her, and afterwards brings action against the parties implicated, to recover the damages which she sustained. The consent goes only to mitigation of damages and doubtless limits the same to the actual damages proven.[45]

Distinction Between Civil and Criminal Malpractice.—1. The former is a *civil*, the latter a *criminal* action.

(a) The one is brought by the injured patient; the other, by the state.

(b) In the first, the patient recovers for his damages; in the second, a fine is levied and perhaps imprisonment inflicted as a punishment for the offense.

(c) The civil is compensatory, for damages sustained; the criminal is remedial and punitive for the purpose of preventing the crime.

2. The civil action is based upon want of skill, care or good judgment; the criminal action has no reference thereto, the act itself constituting the offense.

3. In the civil, the consent of the patient usually is a complete defense where that fact (as consent to a surgical operation) enters as an element in issue; in the criminal, the consent of the patient is immaterial, and at most merely makes her a *particeps criminis*.

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[43] People *v.* Johnson, 33 Colo., 224; Beasley *v.* State, 89 Ill., 572.

[44] Hatchard *v.* State, 79 Wis., 357.

[45] Miller *v.* Bayer, 94 Wis. 123; Greenleaf Ev., Sec. 85; Shay *v.* Thompson, 59 Wis., 548; Fitzgerald *v.* Cavin, 110 Mass., 153; Commonwealth *v.* Collberg, 119 Mass., 350; Adams *v.* Waggoner, 33 Ind., 531.

4. The *necessity* for the operation is not ordinarily a defense to a civil suit; whereas, in a criminal action, the *necessity* of the operation to save the life of the mother is a complete defense under our statute, and should be irrespective of statutory provisions.

CHAPTER XVII

FALSE REPRESENTATIONS

Fraud.—*Any deceitful practice in depriving or endeavoring to deprive another of property or rights by means of some artful device, trickery, chicanery, contrivance, stratagem or plan contrary to the plain rules of common honesty, is fraud.*[1]

Fraud may be said to consist in deception intentionally practiced upon another to induce him to part with his property or to surrender some legal right or claim, and which deception accomplishes the end designed.[2] The fraud which gives rise to an action of deceit exists where a person makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge, when he does not know whether it is true or false, with the intention to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to do so, or to refrain, to his damage.[3]

Effect.—*Fraud vitiates everything it touches and makes voidable every contract it induces.*

Intent.—*A fraudulent intent or design is necessary in order to predicate a right of action.* Where the statement is made or the opinion expressed with knowledge of its falsity, or recklessly without any knowledge of its truth or falsity, and as a positive assertion calculated to convey the impression that the speaker knows or believes it to be true, a fraudulent intent will always be inferred. Where the statement or opinion was false and material, and the party when he made it knew that it was false, or, not knowing whether it was true or false and not caring what the effect might be, made it in reckless disregard of the facts, and paying no heed to the injury which might ensue to the other party, a fraudulent intent will be presumed.[4] An honest error of judgment is not sufficient to predicate a charge of fraud because the wrongful intent is wanting.[5] Where an opinion is recklessly made, however, a fraudulent intent may be presumed.[6]

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[1] Mitchell *v.* Kintzer, 5 Pa. St., 216, 219.

[2] Judd *v.* Weber, 55 Conn., 267, 277.

[3] 26 C. J. 1059.

Corrupt Motive.—There need not be a corrupt motive of gain nor a wicked motive of injury to predicate an action of deceit, although the former is usually present. The gist of fraudulent representations is the producing, by statement or conduct, of a false impression upon the mind of the party to whom they are made, with the intent to create such false impression, and, where this result is accomplished, the means by which it is consummated, whether by the expression of a belief or by the assertion of a fact, are not very material as a matter of justice and fair dealing. A charge of fraud may be based upon a knowingly false expression of opinion by an expert, or upon an expression by an expert of an opinion in utter disregard of the facts and inconsistent with the honesty and good faith of the party expressing it, where the party has, or, under the law, should have special knowledge on the subject not possessed by the other party, and where he ought to be able to approximate the truth.[7]

Materiality.—It must appear that the representation of fact or opinion was material to the transaction, otherwise the court will not attempt to give relief.[8] The fact that the statement or opinion was intended to deceive, was of a character calculated to deceive the party to whom it was addressed, and actually did deceive, are considered sufficient to establish its materiality.[9] To be actionable the representation must be as to a material fact, and susceptible of knowledge.

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[4] Hedin *v.* Institute, 62 Minn., 146; Kuntze *v.* Kennady, 147 N. Y., 124, 129.

[5] Johnson *v.* Beeney, 9 Ill. App., 64.

[6] Miller *v.* John, 208 Ill., 173.

[7] Hedin *v.* Minnesota M. & S. I., 62 Minn., 146; Picard *v.* McCormick, 11 Mich., 68; Kost *v.* Bender, 25 Mich., 515; Powell *v.* Flecther, 18 N. Y. Supp., 451 and 19 N. Y. Supp., 911.

[8] McAleer *v.* Horsey, 35 Md., 439.

Opinions.—In ordinary business transactions, the expression of an erroneous or false opinion is not considered, in law, a false representation. Thus, opinions of quality, utility, value, capability or other generally recognized commercial attributes of an article are not regarded as statements of fact, within the meaning of the law. A representation that a worthless medicine is a sure cure for cholera is a statement of a fact, not the expression of an opinion, and is actionable fraud if relied upon.

Caveat Emptor.—*Caveat emptor* was the prevailing doctrine at common law. The rule was based upon the presumption that both parties to the transaction are equally competent to form an opinion; that neither should be misled by the knowingly false or honestly erroneous opinions of the other, and that as the basis of the opinion is equally within the knowledge of both, neither should be deceived by the alleged mental conclusions of the other. In a great majority of business transactions this presumption is practically true, and neither party thereto is materially influenced by the opinions of his adversary.

Peculiarity of the Relation.—We are readily convinced where we want to believe. The afflicted are easily deceived. With reference to their ailments they grasp at phantoms, pursue the will-o'-the-wisp and cling to an offer of relief with the tenacity of a delusion. Money has little significance except as a means of restoration to health. The invalid is readily persuaded to spend his substance for remedies which do him no good. Treatment, like religion, is taken on faith and, once the patient is convinced, he becomes the dupe of the most arrant impostor. In any event he can know the value of the treatment only by results and in the meantime his money is being wasted. The causes which lead to health and disease are often obscure and elude even the trained mind of the honest and faithful practitioner. How easy, therefore, for the dishonest practitioner to persuade his victim to continue treatments until his substance is squandered and he is impoverished.

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[9] McDonald *v.* Smith, 139 Mich., 21; 102 N. W., 668.

Trust and Confidence.—The relation of physician and patient necessarily imposes a large degree of trust and confidence on the part of the patient and should require the utmost good faith and fair dealing on the part of the practitioner. The law justifies a patient in relying upon the representations of his physician as to the nature of his malady, the curability thereof, the character of treatment necessary and the ability of the physician to afford relief. If a practitioner is required by his patient to give an unqualified opinion as a condition precedent to his employment to treat the patient, he must use reasonable and ordinary skill and care, and his best judgment, and exercise good faith and the strictest honesty, eliminating all selfish considerations in forming and expressing that opinion. In such manner only can he discharge his full legal duty in this respect. The reposing of faith and confidence by one party in another and the justification thereof in the law, are important elements in an action of deceit.[10] There are certain relations in which the law takes cognizance of the fact that the parties thereto are not on an equality; that one of the parties holds a dominant position; that the origin of the special relation is due to the superior knowledge and ability of the one over the other in the subject-matter involved; that a degree of special faith and confidence is essential, or at least important, to successful results from the efforts put forth in that behalf; that the general welfare requires that the utmost good faith be exacted of the dominant party, and that the other party be encouraged to repose faith and confidence in the superior. These considerations have special application to the medical profession.

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[10] Clodfelter *v.* Hulett, 72 Ind., 137.

Confidential Relations and Special Knowledge.—An opinion may be a sufficient basis for an action of deceit, under proper conditions of subject-matter and relation of parties. Introduce a confidential relation and the reason for the rule of *caveat emptor* ceases. Where the disparity is great, the expression of an opinion may have all the consequences, and should have all the legal responsibilities, of an assurance of a material fact. Where the relation is in its nature confidential, and the subject-matter is a profession requiring special knowledge and skill, and the party expressing the opinion is a practitioner therein, while the one to whom the opinion is conveyed is not versed in the profession but is actuated by self-interests to believe the statements, the assurance of a belief may be sufficient in itself to induce and control the conduct of the party to whom it is communicated, and the practitioner should be held to the strictest accountability for the honesty, disinterestedness and practical accuracy thereof. The patient may have no means of testing the truth of the opinion of the practitioner or the good faith of its utterance. Where one of the parties to a transaction possesses special learning and skill not possessed by the other on the subject with respect to which the opinion is given and which is the subject of the relation, and where the other party is justified in believing that such opinion can and ought to be an approximation to the truth, and the relation is such as to justify a reliance by the one on the good faith and ability of the other, an action of deceit may be predicated for the false or reckless statement thereof, *when deception is intended* and damage results in reliance thereon. Of course, this does not mean that a practitioner cannot express an opinion except at his peril, nor communicate his belief without being liable for deceit, if it turns out to be wrong. We are considering only his good faith in reference thereto. He cannot use a professed opinion as a vehicle to entrap and defraud his patients. He must not pretend to have a conviction which he does not hold, nor make capital out of an opinion which he cannot honestly possess.[11]

False Pretenses.—*It is a fraud for a practitioner to pretend, to the detriment of his patient, that he can cure or alleviate a disease when he should know he cannot;* or that his patient is improving, when he knows or ought to know that the trouble is not being relieved; or that he understands the nature of the malady when, in fact, he is ignorant thereof. In all these cases, the law should charge knowledge, where the practitioner with the application of ordinary skill and care, and the exercise of good judgment, ought to have known. If he finds he cannot help his patient he must advise him of that fact.[12] He owes this duty of informing his patient for two reasons, (a) that the patient may determine whether he wants to continue the services, and (b) that he may seek relief elsewhere, if he desires.

Misstating Improvement.—Where a practitioner, knowing that he cannot cure an ailment or relieve a trouble, and concealing such prognosis from the patient, persuades the latter to take or continue a course of treatment and, during the progress of the treatment, encourages him to believe that he is improving satisfactorily, well knowing that his assurance is false and that the patient is relying upon his statements, he is guilty of such fraud as will defeat a recovery for his services in that behalf.[13]

Fair Dealing.—If he finds that he cannot cure, he must so advise his patient, and any concealment of his ignorance of the patient's disease, or of his inability to afford relief, while at the same time encouraging the patient to continue the services, is a gross fraud on the part of the practitioner and ought to defeat his right of recovery for such services, if indeed it ought not to be attended by more serious consequences.[14] Even though, because at the inception of the treatment, the physician did not know that his method would be ineffective, he might be justified in undertaking the case, still, if, during the progress of the treatment, he discovered that he could do the patient no good, or, by the exercise of the care and skill required of him, he could have discovered such fact, but did not, or, if, having discovered it, he concealed the same from the patient and encouraged him to continue the treatment and accept the services, then unquestionably he ought not to recover any compensation therefor, after the discovery that his treatment would be ineffectual, or after he could have discovered its want of efficacy by the exercise of reasonable skill and care. While the responsibility of practitioners is not based upon the result of their remedies, they owe their patients the highest degree of fairness and good faith and they must not be guilty of any deception or indirection to the detriment of their patients.[15]

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[11] Hedin *v.* Minnesota Med. & Surg. Institute, 62 Minn., 146; Hicks *v.* Stevens, 121 Ill., 186.

[12] Chase *v.* Heaney, 70 Ill., 268.

[13] Logan *v.* Field, 75 Mo. App., 594.

False Advertisements.—False advertisements in newspapers or by circulars, intended for the public, and soliciting patronage, when acted upon by a party to his damage, may be grounds for an action of deceit.[16] The advertiser need not know that the patient saw the advertisement and has acted upon the information obtained therefrom, and he need not have made any personal representations to the patient.

Third Party.—False statements as to the curability of a malady, method of treatment, and the ability of a third party to cure the same, when made by an agent with intent to defraud and when acted upon to his damage by a patient of his principal in good faith believing them to be true, may be sufficient to predicate an action for deceit against the party making them, by the party thereby defrauded.[17]

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[14] Chase *v.* Heaney, 70 Ill., 268.
[15] Logan *v.* Field, 75 Mo. App., 584, 601.
[16] Warfield *v.* Clark, 118 Ia., 69.

Illustrations of the Principle.—In a certain case the patient, who was an illiterate man, had previously been permanently injured in an accident which left him a physical wreck. He consulted with the physician in charge of an institute as to his condition, the probability of his recovery and their ability to give him relief. The injury which he had received was a fracture at the base of the skull, and it occurred about a year before the conference with the physician. The evidence warranted the jury in finding that his injuries were incurable and that any honest physician, having the history of the case before him, must, after a proper examination, have come to that conclusion. The evidence tended to show that after an examination the physician positively assured the patient that he could be cured, and that by treatment at the institute he would be made sound and well again. Relying upon these representations, and believing them to be true, the patient was induced to enter into a written agreement obligating himself to pay the sum of five hundred dollars for the treatment. It appears from the opinion of the court that the written contract did not guarantee a cure or promise that the patient would be restored to good health, or even assure him of any relief, but merely obligated the institution to give him the treatment. He paid his money, took the treatment and was not cured. After learning his real condition he brought an action against the institute and the physician to recover the fee paid, on the ground that he was induced to enter into the contract and pay his money to the defendants by means of false and fraudulent representations. To maintain his action is was incumbent on the patient to prove that his malady was incurable; that the defendants represented that he could be cured and that they would cure him; that they knew or, if skillful and honest, should have known that such representations were false; that they were not the expression of an honest opinion, based upon a proper investigation, but were either fraudulently made with knowledge of their falsity, or were uttered with a reckless or ignorant disregard of facts, and of the interest of the patient; that the patient did not know their falsity but believed them to be true; that in reliance thereon he entered into the contract and parted with his money; that his condition was such that an honest physician should have been able to approximate the truth and to have known that his malady was incurable. On the trial, before a jury, the patient obtained a verdict and judgment for the $500 which he had paid, and interest thereon from the date of payment and, on appeal, the judgment was affirmed.[18] The honest practitioner can usually approximate the truth in his prognosis in such cases, and the patient is justified in relying upon his opinion as being substantially correct. The law must exact of the practitioner the utmost good faith in this respect. He dare not pretend to have an opinion which he does not hold, nor express an opinion which, ordinary skill and honesty should know to be false. If the expressed opinion is contrary to the enlightened judgment of the profession at the time and place, the jury are warranted in concluding that it was deliberately false and that the practitioner knew he could not accomplish the results stated and, therefore, that the representations and promises were made for the wrongful and deliberate purpose of depriving the patient of his money, without giving the consideration anticipated by the patient and promised by the physician.

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[17] Hedin *v.* Institute, 62 Minn., 146; Kenner *v.* Hardin, 85 Ill., 264.

In the Logan case *supra* a physician brought an action to recover his fee for treatments and the patient defended on the ground of malpractice, charging that the physician knew he was doing the patient no good, while pretending to the patient that he was improving. The physician was practicing as a specialist for diseases of the nose, throat and ear. Covering a period of nine months he had previously given the patient sixty-four treatments for his malady, which was an affection of the nose, and had received his pay therefor. It appears that the treatment did not do the patient any good. Later, he returned for treatment, but told the physician he could not take the same unless he could be cured, and the physician said that he could not tell him at that time, but encouraged him to renew the treatments, which was done. During the second course of treatment the physician frequently told the patient his nose was getting along "beautifully." In fact, however, he was not improving and the physician subsequently admitted such fact and said that an operation would be necessary in order to effect a cure or afford relief. Apparently, the patient refused to submit to an operation. On refusal of the patient to pay for the treatment, the physician brought suit for his fee and the patient, as his defense, charged malpractice, alleging that he had received no benefit and that the physician knew, or ought to have known, that he could not help him. The case went to the Appellate Court because of alleged error in the refusal of certain instructions asked by the patient. It was considered by the court that if the practitioner, by the exercise of that degree of skill and care which the law exacts of him, might and reasonably ought to have discovered (a) that the disease of the patient was incurable, or (b) that it was a case that would not yield to the usual mode of treatment, or (c) that it was probable that the patient would not be benefited by such treatment, and yet failed to make such discovery, or, if he made such discovery and failed to advise the patient thereof, he was guilty of such negligence and bad faith as ought to defeat his recovery for the services. It was his duty to act in the utmost good faith towards the patient, and if he knew that he could not accomplish a cure, or that the treatment adopted by him would probably not be of any substantial benefit, it was his duty to advise the patient to that effect, and a failure to disclose such fact to the patient was a breach of his duty.

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[18] **Hedin *v.* Institute, 62 Minn., 146.**

Certainty of Proof.—None of the essential elements of fraud need be established to a mathematical certainty; in fact such a thing as mathematical certainty cannot exist in the enforcement of the law. All that courts and juries usually have to act upon is proof establishing belief to a moral certainty, and moral certainty always admits the possibility of error.[10]

Elements of the Tort.—The essential elements (a) of an action of deceit brought by a patient against a practitioner for the expression of a false or erroneous opinion, or (b) of fraud as a defense to an action for a fee, are—

(a) The opinion must have been communicated directly or indirectly by the practitioner to the patient;

(b) The opinion must, in fact, have been false or erroneous;

(c) The practitioner must, at the time, have known it to be false, or, not knowing its truth or falsity, he must have promulgated it under such circumstances as to show a disregard for the interest of the patient, and that he ought to have known the approximate truth;

(d) The practitioner must have intended to deceive the patient;

(e) The patient must not have known the falsity of the opinion;

(f) The patient must have been justified, under the circumstances, in believing the opinion to be true;

(g) He must have believed it to be true;

(h) He must have relied upon it and his conduct must have been controlled by it;

(i) The opinion must have materially induced the conduct of the patient in his reliance thereon, and it must appear that without it his conduct would probably have been different, but it is not necessary that it should have been the sole inducement;

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[10] Brown *v.* State,—Okl.,—; 132 Pac., 359.

(j) The patient must have been damaged by his reliance upon the representations.[20]

Remedies.—Where a patient has been defrauded by the false and fraudulent representations, opinions and pretences of a practitioner, into parting with his money for treatment which inevitably can do him no material good, he may, upon discovery of the fraud, bring an action and recover the money he has paid, and any other actual damage he has sustained. On the other hand, if he has made no payment, but is sued for a fee for the treatment, whether the action be based on a contract induced by the fraud or upon an implied agreement to pay for the services, he may urge the deceit as a defense and, if he establishes the same, he will defeat the claim asserted against him and, on proper pleadings, may even recover judgment for any actual damages he may have sustained.

Damages.—The treatment may not have resulted in any actual damage to the patient, and he may have suffered no loss, except the money or other consideration with which he parted and, in that event, his recovery in an action of deceit would be limited to the amount of that consideration. If he parted with money he would be further entitled, in some states, to interest thereon from the date of payment to the time of the judgment.[21] If he parted with property, he can recover its fair cash value as of the date of delivery to the practitioner and, in some states, in addition thereto, he may recover interest thereon from the date of such delivery to the date of the judgment.

False Representations by Patients.—A patient who procures the services of a physician on false representations as to his property is liable criminally under a statute imposing a penalty on whoever obtains from another by false representation any money, personal property or valuable thing.[22]

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[20] Hicks *v.* Stevens, 121 Ill., 186; Eaton *v.* Winnie, 20 Mich., 126.
[21] Hauk *v.* Brownell, 120 Ill., 161.

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[22] State *v.* Ball,—Miss.,—; L. R. A. 1917 E, 1046.

CHAPTER XVIII

ANESTHETICS

Anesthesia means a loss of sensibility to external impressions; in a technical and restricted sense, a loss of the sense of touch. Frequently, however, it is a general term used to denote all classes of insensibility. The agent which produces anesthesia is termed an anesthetic; therefore, *an anesthetic is any remedy used to relieve pain or other hyperesthetic condition of the sensory nerves.*

Kinds of Anesthetics.—There are two principal groups of anesthetics when classified according to the nature of their effects:

1. *Local,* as affecting a restricted area or part of the body, and
2. *General,* as affecting the entire body.

Cold is one of the most useful and generally employed local anesthetics. This condition is now usually brought about by the use of ether or ethyl chlorides, as a spray. Local anesthesia is frequently produced by the use of cocaine, eucaine, holocaine, orthoform, etc. Some of the more common general anesthetics are ether, chloroform, nitrous oxide, antipyrine, acetanilid, etc.

Effects of Anesthetics.—In cases of anesthesia from the administration of a general anesthetic the following propositions of fact may be said to be established by the consensus of medical experience and opinion:

1. Consciousness of external impressions is impaired in the early stages.
2. This impairment is progressive.
3. The impressions which reach the mind during the progress of anesthesia are distorted and somewhat perverted.

4. Consciousness of external impressions is entirely lost in the final stage.

5. Voluntary muscular movement is not lost until the final stage.

6. Emotions of an erotic character are sometimes excited.

7. Memory of events occurring during the progress of anesthesia is distorted and sometimes wholly unreal.

8. Dreams are sometimes experienced.

9. The impressions left by these dreams remain fixed in the mind with all the vividness of real events.

Right to Administer.—The law recognizes the importance of anesthesia in the science of surgery, and that its use is indispensable to the successful performance of many operations. The question of its use in a particular case is a matter resting largely in the sound discretion of the operator. The welfare of his patient must always be the paramount consideration. A general anesthetic should not be given where a local application will be equally effective and appropriate. The right to administer anesthetics, general and local, should be implied in a medical degree from a modern medical school, because the court should take judicial notice of the fact of universal knowledge that instruction in the properties, effects and uses of anesthetics is an indispensable part of the work of all schools and that information on the subject is essential to equipment for the profession. However, if the patient charges ignorance in this respect and introduces any evidence tending to sustain his charge, the operator would be put to the necessity of showing his qualifications and experience in the premises. If there is any reasonable justification in fact for resorting to the expedient, considering the nature of the operation and the condition of the patient, and the patient desires or consents to the same, the practitioner may employ it in connection with his professional services, and he will not be answerable for untoward results merely by reason of the fact of having administered the drug. The law indulges no presumptions, either of ignorance or skill. If the plaintiff alleges ignorance in the matter of administering the anesthetic, as the basis of his right of action, he must prove his allegation or lose his case. If he offers no proof of ignorance, there is nothing on which to found his charge, since the law does not presume that the practitioner was ignorant. If the patient introduces evidence tending to sustain his allegations, the practitioner must show that the anesthetic administered and the method of administration were in accordance with the teaching and practice of the profession at the time and place. In practice, an operator is not likely to be charged generally with being ignorant. Such an allegation might be extremely difficult to prove and, even if proven would avail the patient nothing unless he also proved that, by reason of that ignorance, he was injured. The want of skill must have been manifested in the particular case. Ignorance must be translated into action or non-action before the patient can complain. The conduct, not the ignorance, is the real ground of complaint. The practitioner may be generally ignorant and unskilled but may do right by chance, accident or mistake. Why should the patient complain? He may be ever so skilled and do wrong through negligence and, thereby, injure his patient. Why should the patient not recover for his injury?

Selection of Anesthetic.—The operator must use his best judgment, based on his knowledge, experience and skill, after careful examination of his patient, in selecting the most appropriate anesthetic under the circumstances. Chloroform should not be given where there is weakened heart action from disease, if any other reasonable course is available. Where there is chronic or severe kidney trouble an anesthetic should not be given unless reasonably necessary. An error in these respects, resulting in injury to the patient will render the operator liable for malpractice, in event the error was due either to his ignorance or to his careless.

Duty to Administer Anesthetic.—Failure or refusal to administer an anesthetic, where the same was not clearly and indispensably necessary and proper, is not even *prima facie* basis for an action for malpractice.[1]

Legal Responsibility in Administering Anesthetics.—In administering an ordinary anesthetic in general use for the purpose of his professional duties, a practitioner is required, in law, to anticipate only natural, ordinary, usual and probable consequences,—those results which, from general experience, may be expected. Conversely, he is not answerable in malpractice for failure to anticipate unusual results arising from a peculiar condition or temperament of his patient, of which, after the usual diagnosis with the exercise of reasonable skill and care, under the circumstances, he had no knowledge. Where the administration of the anesthetic is necessary or proper for professional purposes, objection to its administration not appearing or being discoverable by skillful diagnosis, the practioner is not liable, in an action for malpractice for resulting damages unless at least two facts coexist, namely:

1. That he was guilty of negligence in reference to the administration of the anesthetic, and
2. That the injury of which the patient complains was the result of this negligence in the use of the anesthetic.

The negligence in the administration of the anesthetic may consist (a) in administring it without sufficient preliminary examination, or (b) in administering an unfit and unsuitable drug, or (c) in the unskillful or careless manner of administration, or (d) in the excessive amount given.[2]

Extreme Responsibility in Fact.—In dealing with anesthetics, the practitioner must know that he is using instrumentalities which are dangerous and deadly, and his care in diagnosis, selection of drug and administration, must be in proportion to the risk involved to his patient. His responsibility begins with the examination preceding the administration of the drug, and carelessness or ignorance in diagnosis, resulting in the determination to use the particular drug, or to resort to anesthesia, when clearly it should not have been given, will make him liable in malpractice for resulting injuries, and possibly for manslaughter, where the consequences are death. He cannot trifle with the health or life of his patient and not shoulder the responsibility.[3]

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[1] Dye *v.* Corbin, 59 W. Va., 266.

[2] Bogle *v.* Winslow, 5 Phila., 136, 139.

Death from Anesthetic.—Death while anesthetic is being administered is not *prima facie* evidence of negligence or malpractice.[4] *"Res ipsa loquitur"* does not apply.[5]

Value of Testimony.—The fact that, during the last stages of anesthesia, the mind is entirely lost to outward impressions, and the entire sensory nervous system has suspended its functions, should be sufficient to stamp with great uncertainty the statement of a person as to what occurred to him during the progress of anesthesia, or while under the general influence of an anesthetic, when the statement is based upon his alleged sensations at the time; therefore, when to actual mental suspension there is added possible hallucinations and self-deception of a character similar to the alleged experience, the testimony has but few elements entitling it to credit. Manifestly, but little reliance can be placed upon supposed impressions alleged to have been received, or experiences alleged to have occurred during the time. These facts have an important bearing on the credibility of a female who claims to have been deflowered while under the influence of a general anesthetic for professional purposes, and indicate that the corroborating circumstances should be strong in order to justify a belief that the event actually occurred.

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[3] State *v.* Baldwin, 36 Kan., 1.

[4] London *v.* Scott, 58 Mont., 645; 12 ALR, 1487.

[5] Id.

CHAPTER XIX

INSANITY

> ''Man's body is the chariot that sweeps
> With flashing spokes life's dusty road along;
> The soul, the driver that, among the steeps
> And hills of life, with steady hand and strong,
> Directs with subtle skill and nicest tact
> The senses six, that as the horses act.
>
> Great is the driver that can calmly rein
> The horses to the pace and carriage just;
> But woe to him that lacketh to restrain
> One single sense, that in its fleshly lust
> Disdain the curb. Behold, upon the plain,
> The chariot wrecked, the hapless driver slain.''

Mental Processes.—There is no fixed line of demarkation between sanity and insanity. The processes of mental activity are the same whether sane or insane, although they differ in their origin as well as in the degree of their intensity.

Cerebral Cortex.—To understand insanity, you must know the normal action of the mind, and have some knowledge of the *physical basis of mental action.* This involves a study and knowledge of the contents of the cerebral cortex and its association fibers. The functions of the contents of the cerebral cortex, briefly and generally stated, are,—

A. INTELLECT.—

1. To receive impressions from the organs of sensation, that is, *conscious perception.*
2. To group these impressions into a unit known as a concept, that is, *conscious thought.*
3. To store up these concepts or thoughts,
   - (a) For future recollection and recognition, that is, *memory,*
   - (b) For gathering into novel combinations, that is, *imagination,* and

(c) For use as a basis of *reflection,* that is, *judgment* and

4. To express thought in speech and action.

B. SENSIBILITY OR FEELING.—

5. To experience emotions which accompany mental activity, that is, *sensibility* or *feeling.*

C. WILL.—

6. To exert self-control over mental action, that is, *attention, choice,* etc.

Classification.—The faculties of the mind readily resolve themselves into the three distinct classes above referred to, namely:

1. Intellect,
2. Sensibility, or feeling, and
3. Will.

To illustrate,—You read the pages of a book, and thereby the thoughts of the author become your thoughts. *This is Intellect.*

But you get more than this from the reading of the book. The thoughts produced awaken in you feelings, emotions and mental excitations. *This is Sensibility.*

Perhaps you derive still more than this. The thoughts produced not only awaken and arouse your sensibility, but you are prompted to act, to do something, as the result of the emotion excited in you. *This constitutes Will.*

If either of these faculties is impaired, there will be a corresponding derangement of the mind. If the impairment is of sufficient magnitude, it will amount to what is known as insanity.

Intellect as above implied is subdivided into presentation or *Perception,* re-presentation or *Memory,* and perhaps *Recognition.* If the re-presentation is not of exact previous perceptions, it is *Imagination.*

Choice.—The free exercise of the will presupposes *choice.* Thus, in the illustration above given, you determined or intended to act in a particular way· This presupposes a previous act of mind, a choice between alternatives. It might have been so instantaneous as not to be perceptible except upon reflection, but there must have been presented to your mind the question,—Shall I or shall I not do so and so?—and the mind having exercised the choice between them, the executive will manifested itself in accordance with that choice. *Where there can be no choice there can be no freedom of will,* and if the inability to choose is the result of disease or a condition within the brain itself, the party is relieved from criminal responsibility for the resulting act.

Functional Disturbances and Mental Phenomena.—When areas of cerebral cortex are diseased, one or more of the cortical functions above named may be impaired, impeded or suspended, and mental disorder results. If changes in blood-supply or in nutrition occur, or if disease affects the entire cortex, insanity may result, and as a consequence, thought becomes illogical; emotion becomes excessive or depressed, or arises without external stimulus; action is irregular or purposeless, and conduct is not properly adjusted to surrounding circumstances. In the insane person, impressions from sense-perceptions may be wrongly interpreted, giving rise to *illusions.* Ideas may arise without any sense-perception at all. These false preceptions without external origin in sensory experience are called *hallucinations.* A mistaken idea may be harbored by anyone; as, the size or distance of an object. Measurement, examination and calculation may convince the person of his error, and if he is sane he corrects his judgment. The insane man is not affected by logical methods and analyses, and retains his erroneous ideas in spite of demonstration and reasoning. A mistaken idea, accepted without logical foundation, is a *delusion;* if retained in spite of demonstration of its falsity, it is an *insane* delusion.

The reader is referred to standard medical works for a discussion of the medical aspect of the subject, its factors and causes, forms and classification, signs and tests, etc.

The Law.—Law follows, but in normal conditions never precedes enlightened, deliberate, prevailing, persistent public sentiment. It is the delayed expression of public opinion on the subject involved. With experience and information our notions of right and wrong change; furthermore, the relations of individuals towards society and each other are gradually changing and, therefore, where these changes are pronounced, there is a continual conflict between enlightened public conscience and its legal expression. If the law is not changed, it becomes a dead letter and is relegated to the dominion of innocuous desuetude. Out of this fact of progression springs most of our so-called judge-made law. This is a misnomer. The judge does not make the law, he merely recognizes the manifestation of public conscience, as he interprets it. "If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns; which is an honorable and commendable thing in our law, for thereby it appears that we don't despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation."[1]

The attitude of the law towards the insane is a good illustration of the growth of law in harmony with the development of our knowledge of the subject.

Insanity in Law.

Presentation.—In law, the question of insanity is presented in two classes of cases, namely,

1. In criminal law, as exonerative of what would otherwise be criminal acts, and
2. In civil law, as incapacitating a person for ordinary business transactions, making contracts, wills, etc.

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[1] Justice Saunders in Buckley *v.* Thomas, 1 Plowd., 118 (1553).

In legal contemplation, *insanity consists in the lack of such mental soundness as renders a person criminally responsible for his acts, or capable of managing his own business affairs.* There is a great difference of legal opinion as to what extent of disease or imperfect development, and what, if any, aberrations of mind, not traceable to disease or imperfect development of the brain, constitute this degree of mental unsoundness. The tendency has been, and still is, to enlarge the scope of the word and to extend the rules of insanity to derangements not recognized in earlier times as a defense to a charge of crime. Insanity, however, is not merely mental disorder, although disorder of mind is always present: that is to say, not every mental disorder is insanity.

Presumption of Sanity.—*All persons who have reached the age of discretion are presumed to be sane, until the contrary is shown.* The burden of proving insanity rests upon him who alleges it.[2]

Presumption of Continuity of Insanity.—Habitual insanity having once been established is presumed to continue until the contrary is shown.[3] In other words all persons, in the first instance, are presumed to be sane, but after insanity is once established by proof, that condition is presumed to continue.[4] When insanity is once shown to have existed, the burden of proving sanity rests upon the party who alleges a restoration.

Evidence as to Insanity.—In the trial of an issue of insanity, evidence of hereditary taint is competent to corroborate direct proof of the disease, but proof of taint alone is not sufficient to overcome the presumption of sanity. Proof of acts, conduct, temperament and habits inconsistent with the known character and previous habits of the person are competent in establishing insanity, taken in conjunction with surrounding facts and influences.[5] It may be shown that the person whose sanity is in question has been under and subject to the influences of the recognized causes of insanity. Any symptoms of the disease known to the medical profession and present in the case may be produced in evidence. Many of these symptoms are largely medical in character, and generally must be introduced through medical men. Where the question of sanity at a particular time is involved, insanity prior or subsequent to such time may be shown, remoteness merely affecting its weight.[6]

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[2] Stevens *v.* Shannahan, 160 Ill., 330.
[3] Langdon *v.* People, 133 Ill., 382.
[4] Titcomb *v.* Vantyle, 84 Ill., 371; Ellars *v.* Mossbarger, 9 Ill. App., 122.

SUICIDE AS EVIDENCE.—Suicide is not *per se* even *prima facie* evidence of insanity but the fact and the circumstances may be taken into consideration in determining the question.[7]

ABSENCE OF MOTIVE FOR CRIME.—In criminal cases, the absence of any apparent motive for the commission of the offense is a circumstance to be considered by the jury in connection with other evidence of insanity, together with the circumstances and character of the offense, but absence of motive of itself, does not prove insanity.[8]

General Practitioner is an Expert on Insanity.—The usual rule is that a general practitioner of medicine is a competent witness concerning insanity, and that a special study of that subject is not required.

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[5] Smith *v.* Kramer, 5 Pa. L. J., 226; Snow *v.* Benton, 28 Ill., 306.
[6] Dickinson *v.* Barber, 9 Mass., 225.
[7] 32 C. J. 756 *et seq.*
[8] People *v.* Barber, 115 N. Y., 475.

CHAPTER XX

INSANITY

In Criminal Law

Intent.—*Non est reus, nisi meus sit rea. An evil intent is a necessary element of every criminal offense.*

> "Let my disclaiming from a purposed evil,
> Free me so far in your most generous thoughts,
> That I have shot mine arrow o'er the house,
> And hurt my brother."[1]

Since a criminal intent is an essential element in very crime, *a person destitute of the mental capacity to entertain this intent cannot incur legal guilt.* The decisive question is, and in every enlightened system of jurisprudence, must be,—*Was the person mentally capable of entertaining a criminal intent?* A person may act without the concurrence of a responsible will even though he is not raving, and though he knows what he is about and lays and executes plans with great shrewdness and sagacity.

At Common Law.—At common law an insane person could not be convicted of any crime, not even high treason.[2]

Homicide.—In criminal law, the question of insanity is most frequently raised as a defense in homicide cases, and the question becomes, *What degree of insanity should exonerate a defendant from the penalty of his act?* Here again, the history of the law is the history of the progress of knowledge on the subject of mental derangements.

Tests.—(a) ABSOLUTE WANT OF REASON.— The early English law applied what is sometimes denominated "the wild beast test," and it was expressed by Lord Hale as follows: "A man to be exempt from punishment for an act must be totally deprived of his understanding and memory, and must not know what he is doing any more than an infant, a brute or a wild beast."[3] This is known as Lord Hale's test.

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[1] "Hamlet": Act V, Scene 2.

[2] Co. Inst. pt. 3, p. 4.

An imbecile who had the intelligence of a child over fourteen years of age was held responsible for his acts.

(b) KNOWLEDGE OF RIGHT AND WRONG GENERALLY.—Later, the English Courts adopted the test,—Had the defendant at the time he committed the act, the power to distinguish right from wrong in the abstract. Both these tests, however, have now disappeared from English Jurisprudence and may be said never to have been the law in this country.

(c) KNOWLEDGE OF RIGHT AND WRONG WITH REFERENCE TO THE PARTICULAR ACT.—By this test, the question is,—Was the defendant at the time of committing the act, able to distinguish between *the right and wrong of the particular act?* Where this is the standard, insanity is inability to distinguish between right and wrong in respect to the act in question, or inability to be conscious of acting contrary to law. This test substantially is, at present, used in England and in some of the States of the United States.

(d) POWER OF CONTROL.—This test is, knowledge of right and wrong with reference to the particular act, and the power to choose the right and avoid the wrong, that is, the power of control. The characteristic feature of this test is the *power* of *choice.* By this test the question is,—*Had the defendant, at the time of committing the act in question, the ability to distinguish right from wrong, with reference to such act, and also the power to adhere to the right and avoid the wrong?*[4]

In the Hopps case above cited, the court says: "Where a party who is upon trial on an indictment for murder, interposes the defense of insanity, the rule in regard to character and degree of insanity which would demand an acquittal, is thus laid down: That where it shall appear from the evidence that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by (a) over-riding reason and judgment, (b) obliterating *the sense* of *right and wrong as to the particular act done,* or (c) depriving the accused of *the power of choosing between them.*" (391.)

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[3] 16 State Trials, 176.

[4] Hopps *v.* People, 31 Ill., 385; Parson *v.* State, 81 Ala., 577.

The real distinction lies in the power of choice.

"If, from the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true that there is *an unsound condition of the mind* in which, though a person abstractly knows that a *given act is wrong,* he is yet, by *an insane impulse,* that is, an impulse proceeding from a *diseased intellect, irresistibly driven to commit it,* the law must modify its ancient doctrines, recognize the truth and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect."[5]

Subjects of Inquiry.—According to the enlightenment on the subject of insanity at the present time, the inquiries to be submitted to the jury in every criminal trial where the defense of insanity is interposed, are, it has been said, as follows:

1. Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a disease of the mind so as to be idiotic, or otherwise insane?

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[5] State *v.* Felter, 25 Ia., 82; Parsons *v.* State, 81 Ala., 577.

2. Did he know right from wrong, as applied to the particular act?

If the first is answered in the affirmative and the second in the negative, he is not legally responsible.

3. If both are answered in the affirmative, he may, nevertheless not be legally responsible if the two following conditions concur:

(a) By reason of the duress of such mental disease, he had so far lost the power *to choose* between the right and the wrong, and *to avoid* doing the act in question, as that his free agency in that respect was, at the time, destroyed, and

(b) At the same time the alleged crime was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely.[6]

However, the element of power of choice is not nominally recognized in many jurisdictions, but in actual practice before juries there is but little difference in results.[7]

Instructions that if the jury believed that (a) at the time of committing the alleged offense, defendant was able to distinguish right from wrong with reference to the particular act, and (b) capable of choosing to do or not to do the acts constituting such crime, he could not be acquitted on the ground of insanity, are proper.[8]

Insane Delusion.—Where a person is under an insane delusion or hallucination, but is rational on other subjects, the rule is that he is not responsible criminally for acts committed under the influence of such delusion or hallucination, where the fact or state of facts existing in his imagination would, if actually existing, justify or excuse the act.

Delirium Tremens.—It is the consensus of medical opinion and a common observation of laymen that a person may voluntarily indulge in the excessive use of intoxicants to such an extent that he loses all power of control over the habit and his mind becomes so diseased that he cannot distinguish between right and wrong, and that delusions and hallucinations are usual concomitants. Hence, when *delirium tremens* have seized upon the victim of reckless indulgence and he is unable to distinguish right from wrong, with reference to the particular act, or, knowing the act to be wrong, is impelled by an overpowering delusion or hallucination which dethrones reason, annihilates rational intent, and controls his power of choice between doing or refraining from doing the acts, he is not criminally responsible in the premises.[9]

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[6] Parsons *v.* State, 81 Ala., 596; State *v.* Lyons, 113 La., 998.

[7] Smith *v.* State, 95 Miss., 786; 22 A. C., 23, 36.

[8] Hornisch *v.* People, 142 Ill., 620.

Somnambulism or Somnambulentia.—Somnambulism and somnambulentia are included under the head of insanity, by alienists, and if the person afflicted with either is so far unconscious at the time that he does not comprehend the moral character of the act performed, or, if comprehending it, he cannot choose between right and wrong, or if his condition may be regarded as that of a person under an insane delusion, with reference to the act in question, he cannot be held criminally responsible for his act.[10]

Drunkenness.—*Voluntary drunkenness is no excuse for crime.* However, where a specific intent is necessary to constitute the offense charged, a person who is so far under the influence of liquor, at the time, as not to know what he is doing may be incapable of committing the offense.[11] If voluntary intoxication were permitted to excuse criminal acts, most premeditated offenses would become a matter of history, because the parties contemplating them would be sure to prepare their defense beforehand.

Epilepsy.—*Epilepsy is not insanity, and proof of epilepsy is not sufficient to establish irresponsibility.*[12] It must be shown that the trouble had so far progressed in weakening the mind that the subject was not conscious of the wrongful character of his act at the time, or was impelled by an overpowering insane delusion.[13]

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[9] State *v.* Driggers, 84 S. C., 526; 19 A. C., 1166; 23 ALR, 433.
[10] Fain *v.* Com., 78 Ky., 183; 39 Am. R., 213.
[11] Chowning *v.* State, 91 Ark., 503; 18 A. C., 529.
[12] Oborn *v.* State, 143 Wis., 249.

Degree of Proof Required.—Where insanity is offered as a defense to a criminal act, and the evidence raises a reasonable doubt as to the sanity of the defendant, he is entitled to an acquittal.[14] If any evidence has been introduced rebutting the legal presumption of sanity, and tending to raise a reasonable doubt of the sanity of the defendant, the burden shifts to the prosecution, which is then required to prove the defendant's sanity beyond a reasonable doubt.[15] The plea of insanity is merely a denial of one of the essential allegations of the indictment, and the burden is not upon the defendant to establish the same, but if a reasonable doubt exists upon the whole evidence as to defendant's sanity he must be acquitted.[16]

Moral Insanity is a morbid perversion, and sometimes accentuation, of the moral feelings. As a proposition of law, *a mere perversion of the moral faculties unaccompanied by mental delusion,* will not invalidate a civil, nor excuse a criminal, act. Mere moral depravity is not insanity.[17]

Irresistible Impulse must not be confounded with passionate propensity or willful temper. No matter how hot the passion or how furious the frenzy, it is not insanity, and the question, in its ultimate analysis, becomes,—*Was there a disease of the brain?* Excitement, anger, jealousy or passion which, for the time being, are permitted to overwhelm the judgment, is no defense to a charge of crime.[18]

Emotional Insanity is a morbid derangement of the emotional powers, or inability to control the impulses. It is closely allied to irresistible impulse. The latter is intellectual, the former emotional. *Emotional insanity is not an excuse from criminal responsibility.*[19]

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[13] People *v.* Gambacorta, 197 N. Y., 181; 18 A. C., 425, 428.
[14] Hopp *v.* People, 31 Ill., 385, 393.
[15] Dacey *v.* People, 116 Ill., 555.
[16] Montag *v.* People, 141 Ill., 75.
[17] Goodwin *v.* State, 96 Ind., 550.
[18] Lynch *v.* Com., 77 Pa. St., 205; Guetig *v.* State, 66 Ind., 94.

Kleptomania does not exonerate from a charge of larceny; but it should mitigate the penalty.

Statute.—A statute which provides that insanity shall not be a defense to a charge of crime violates the constitutional provisions against depriving a party of life, liberty, or property without due process of law and guaranteeing the right of trial by jury.[20]

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[19] David Dudley Field in Ga., Ala. L. J., 273.
[20] State *v.* Strassburg, 60 Wash., 106.

CHAPTER XXI

INSANITY

In Civil Law

Validity of Contracts.—*The contracts of lunatics or persons non compos mentis are voidable, not void, and may be ratified or avoided* when the disabiliity is removed, or during disability, by a conservator legally appointed and qualified.[1] This applies to a deed executed by an idiot before he has been adjudged to be such.[2] But a contract made with a lunatic during a lucid interval is binding on him.[3]

Purpose.—This provision of law is intended for the protection of the incompetent against his own weakness and the avarice of the unscrupulous and, therefore, can be taken advantage of only by him or his representative. The competent party is bound by the agreement as he cannot have any legal grounds for complaint, except, of course, as in the case of all contracts, for fraud, duress, accident or mistake.

Necessaries.—An insane person is liable for necessaries supplied to him in good faith, and it is not necessary to prove a specific agreement, and in fact a specific agreement would not be enforced, because the law raises a contract by implication on the part of the insane person, by virtue of which the reasonable value of such necessaries becomes payable as a debt, but not for an amount in excess of the agreed price, if any.[4] Where there is nothing in the appearance of an alleged insane person to indicate his incapacity, and he purchases *necessary* goods at a *fair and*

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[1] Mead *v.* Stegall, 77 Ill. App., 679.

[2] Burnham *v.* Kidwell, 113 Ill., 425.

[3] Lily *v.* Waggoner, 27 Ill., 395.

[4] Fruit *v.* Anderson, 12 Ill. App., 421.

reasonable price, and the seller has no notice of his having been adjudged insane, he will be liable to pay for the price agreed therefor where no conservator has been appointed for him, and he is in the actual management and control of his own business.[5]

Degree of Insanity Invalidating Contracts.—The tests for insanity in civil matters is entirely different from that applied in the administration of the criminal laws. A party will be considered so insane as to justify an avoidance of his contracts when, from disease, senility or defective development, he is rendered incompetent, successfully to conduct business.[6] Knowledge of right and wrong does not enter into the question, except as it relates to mental strength, and the mind need not be abnormal. In all civil matters, the question is one of mental strength rather than of mental derangement. The operations of the mind may be perfectly regular and rational, but if the mind is too weak to comprehend the nature and effect of ordinary business transactions, or the transaction in question, the court will not permit the party to bind himself by his financial engagements.[7] The question is usually complicated with questions of fraud, duress and undue influence. Where there is some evidence of the presence of any or either of these elements, the courts will not enforce the promises of a party at the suit of his adversary if it shall appear that he was so incapacitated mentally as not fully to comprehend the nature and effect of the transaction.

Marriage.—A marriage is void *ab initio* where the mental faculties of either party at the time of the celebration were so impaired that he or she was unable to understand the nature and effect of the act and, especially, where the mental condition was known to the other and where the imbecile was subject to improper influences exerted to the end that conspirators might profit by the marriage.[8] When unaccompanied by fraud, duress, or undue influence, mere weakness of mind will not invalidate a marriage unless the mental incapacity be such that the party could not comprehend the nature and effect of the transaction; that is, the nature of the contract and the duties and responsibilities it entails.[9] A marriage which is the result of a delusion and without which it would not have been entered into, will be set aside as invalid.[10] In this case the alleged marriage was induced through the medium of spiritualism.

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[5] McCormick *v.* Little, 85 Ill., 62.

[6] Burnham *v.* Kidwell, 113 Ill., 425, 429.

[7] Greene *v.* Maxwell, 251 Ill., 335.

Insanity from delirium tremens, at the time of the marriage, will void the contract, but whether the party was really insane or only intoxicated is usually a question of fact for the jury to decide.[11]

Drunkenness.—*Mere drunkenness will not be sufficient to release a party from his agreement,* but he will be protected against the improvidence of his own contracts, entered into by him while in a state of intoxication which drowns reason, memory and judgment, and impairs the mental faculties to such an extent, for the time being, as to render him *non compos mentis.* When the mind of a contracting party has been broken down by a long course of dissipation, continual drunkenness and debauchery, the feverish moments of a half-sober, or even sober, interval, cannot be called a lucid interval for the purpose of establishing a contract made during such interval.[12]

Impaired Faculties.—Though the mind of a party may, to some extent, be impaired by age or disease, still if he has capacity to comprehend the nature of the business and its effects, and to act rationally in the particular transaction in which he is engaged, if he can understand the nature of his business and the effect of what he is doing, and can exercise his will with reference thereto, his acts will be valid and binding upon him and his representatives.[13]

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[8] Pyott *v.* Pyott, 191 Ill., 280; 25 A. C., 1127.
[9] Dunphy *v.* Dunphy, 161 Cal., 380; 27 A. C., 1230, 1236.
[10] Orchardson *v.* Cofield, 171 Ill., 14.
[11] Prine *v.* Prine, 36 Fla., 676; Gillett *v.* Gillett, 78 Mich., 184.
[12] Martin *v.* Harsh, 231 Ill., 384, 389.

Validity of Wills.—The possession of mind and memory sufficient to enable the testator to transact ordinary business, such as renting his real estate, settling accounts, buying and selling property, and to know and understand the business he was engaged in, and the effect of the disposition made by him of his property, at the time he made the will in dispute, is a proper test of testamentary capacity.[14] *The usual test is that the party be capable of acting rationally in the ordinary affairs of life, and of understanding the effect and circumstances of his acts.*[15] Capacity to transact ordinary business is too high a test of mental capacity for making a will, because cases may exist where a less degree of mental capacity is required intelligently to give effect to a purpose already formed in relation to the disposition of property by will, than is required in the transaction of ordinary business when dealing with others at arm's length.[16] The provisions of the will and the circumstances of the testator should be considered, because a person may be competent to dispose of a small estate among a few persons, by simple gifts, and yet be incompetent to dispose of a large estate among a great number of persons by complex and involved conditions.[17] The capacity must be sufficient to comprehend the condition of the property and the provisions of the will, and to recall those who are the proper and natural objects of testator's bounty, and the memory must be sufficient to retain these with ability to form a rational judgment upon them.[18] But it need not be sufficient to validate a deed where he is dealing with an antagonist, and must balance and compare considerations.[19]

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[13] Martin *v.* Harsh, 231 Ill., 384, 389.
[14] Taylor *v.* Pegram, 151 Ill., 106; Campbell *v.* Campbell, 130 Ill., 466.
[15] Meeker *v.* Meeker, 75 Ill., 260.
[16] Sinnet *v.* Bowman, 151 Ill., 146; Taylor *v.* Cox, 153 Ill., 220.
[17] Taylor *v.* Pegram, 151 Ill., 106; Green *v.* Green, 145 Ill., 264.
[18] Delafield *v.* Parrish, 25 N. Y., 9; 1 Redfield Surrog., 130.

Insane Delusion.—*An insane delusion in regard to one who is a natural object of testator's bounty and affection, and which causes a disposal differing from what testator otherwise would have made, is sufficient to destroy capacity.* The same rule applies if the delusion is in respect to a duty or moral obligation on the part of the testator towards a corporation, society or individual benefited by the will.[20]

A delusion which is unconnected with the facts controlling disposition of the property does not incapacitate.[21]

Undue Influence.—In matters pertaining to the contest of wills on the ground of mental incapacity, insane delusion, etc., the question of undue influence or fraud is usually present and, quite frequently, is the controlling factor. The less the mental capacity the less the improper influence which will invalidate the will, hence the two must be considered together.

Sound Mind and Memory.—The meaning of the phrase "sound mind and memory," is that the testator shall possess sufficient mental power and understanding (a) to comprehend what property he has to dispose of, (b) to recall the natural objects of his affection and bounty, (c) to understand the nature of his acts, and (d) to appreciate the effect his will will have upon the natural objects of his bounty and affection.[22] It is not necessary that testator retain all his vigor of mind and memory since some impairment thereof is not incompatible with testamentary soundness and capacity.[23] Mentality to transact ordinary business, ability to comprehend objects and subjects of bounty, and freedom from insane delusions, which especially affect the power of disposition, constitute testamentary capacity; that is, sound and disposing mind and memory, even though the mind is not perfectly balanced.[24]

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[19] Green *v.* Maxwell, 251 Ill., 335, 340.

[20] American Bible Society *v.* Price, 115 Ill., 623.

[21] Stanton *v.* Wetherwax, 16 Barb., 259; Brace *v.* Block, 125 Ill., 33.

[22] Ring *v.* Lawless, 190 Ill., 520.

[23] Graybeal *v.* Gardner, 146 Ill., 336; Taylor *v.* Pegram, 151 Ill., 106.

Responsibility for Torts.—*Where a loss must be borne by one of two innocent parties, the law places the burden upon the party whose act or default occasioned the same.*[25] Hence, *an insane person or a lunatic,* even though incapable of harboring a wrongful or malicious intent, *is liable in a civil action for torts committed by him.*[26] But where an evil intent or express malice is an essential element of the wrong, an insane person or an imbecile without capacity to have such motives, is not liable for damages resulting from such act. Thus, he cannot be held liable for libel, slander, conspiracy or malicious prosecution.[27]

Homicide.—While an insane person is not liable criminally for a homicide committed by him, he is liable civilly *in compensatory damages to those who have suffered pecuniary loss by the act;* in other words, the gravity of the tort does not relieve nor increase the liability.[28]

Damages.—In an action against an insane person to recover damages for a tort committed, whether of misfeasance or nonfeasance, *the measure of damages is mere compensation to the party for the injury sustained. Exemplary damages cannot be recovered.*[29]

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[24] Hutchinson *v.* Hutchinson, 153 Ill., 347; Freeman *v.* Easly, 117 Ill., 317.

[25] R. Co. *v.* Hall, 124 Ga., 322.

[26] McIntyre *v.* Scholte, 121 Ill., 660.

[27] Jewell *v.* Colby, 66 N. Y., 399; Williams *v.* Hays, 143 N. Y., 442; 4 A. C., 569.

[28] Young *v.* Young, 141 Ky., 76; Ballinger *v.* Rader, 153 N. C., 488; 42 L. R. A., 84.

[29] Holdom *v.* A. O., U. W., 159 Ill., 619; 21 A. C., 1350–5.

CHAPTER XXII

WOUNDS

A Wound is any lesion of the body, and comprises not only solution of continuity, but every kind of accident, such as bruises, contusions, fractures, dislocations and the like.[1] Surgically, a *wound* is a solution of continuity in the soft parts by some mechanical agent.[2] Wound implies force and violence. All wounds are accompanied by some death of tissue, and usually by hemorrhage.

Character of Wounds:

1. *According to depth.*—(a) Superficial, (b) penetrating, and (c) perforating.
   - (a) A superficial wound is one which does not enter deeply into the tissue,—the injury is of the surface.
   - (b) A penetrating wound is one which enters a cavity or part, but does not pass through it.
   - (c) A perforating wound is one which both enters and emerges from a cavity or part.
2. *According to presence or absence of infection.*—(a) Aseptic, (b) septic, and (c) poisoned.
   - (a) An aseptic wound is one not contaminated by bacterial or poisonous infection.
   - (b) Septic wound is one contaminated by bacterial or other fermentive agents, causing suppuration and sloughing.
   - (c) A poisoned wound is one contaminated by poisonous infection. In common parlance we frequently speak of these wounds as clean, sloughing or poisoned, as the case may be.

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[1] Bouvier's Law Dictionary.

[2] Dunglison's Medical Dictionary.

3. *According to the condition of soft parts.*—Incised, lacerated, contused, punctured, penetrating and gun-shot.

    Gun-shot wounds—Facts to be considered:

    1. Orifice of entrance.
    2. Track of missile in the tissue.
    3. Orifice of exit.

Cause of Death from Wounds.—

1. By direct violence and injury to a vital organ.
2. By pressure from hemorrhage interfering with the functions of a vital organ.
3. From severe hemorrhage, either external or into one of the cavities.

Relation of Wound to Death.—

1. No relation whatever of cause and effect;
2. Where such relation may exist;
3. Wound remote cause of death, and
4. Wound proximate cause of death.

Shock.—Shock is the result of powerful impressions made upon the nerve-centers; a sudden depression of the vital powers due (a) to injury, or (b) to profound mental emotion. When due to injury it is called *surgical shock;* when due to fright, grief or other powerful mental impressions, it is called *mental shock.* The latter is sometimes delayed for a considerable time after the occurrence of the violent emotion; it is then called deferred shock.

Delusions, and in children, convulsions, are sometimes present. Through its depression of the nerve-centers, a circulatory paresis is induced, and this results in an accumulation of blood in the large abdominal vessels, with a corresponding loss to the cerebral and peripheral circulation, accompanied by disturbance of voluntary cerebration, and lowering of surface temperature. Shock may be of all degrees, from slight to fatal.

SYMPTOMS.—A condition of shock is denoted by subnormal temperature, rapid and feeble pulse, pinched features, cold, pallid, clammy skin, profuse perspiration, shallow irregular respiration, diminution or loss of sensibility to pain, and a tendency to urinary suppression.

Inflicted in Malice.—If death results from a wound given in malice, not in its nature fatal, but which, being neglected or improperly treated, causes death, the assailant may be held guilty of murder unless it clearly appears that the neglect or improper treatment was the primary cause of the death.[3]

Opinions of Physicians.—When the facts sought to be elicited are material to an issue in court, the following are a few of the countless questions which physicians may be called upon to answer and upon which they may testify as experts:

Might specified symptoms be the result of certain injuries? To illustrate, might a miscarriage have been produced by certain injuries received in a certain manner?

Might a certain wound have been inflicted by a certain instrument?

Are certain injuries permanent?

What force was necessary to produce a certain wound?

What was the nature of the instrument causing a given wound?

Might a specified injury have been received in a specified manner?

Was a certain wound necessarily fatal?

How soon would death necessarily follow the infliction of the wound?

Was the death the result of the wound or of the surgical operation which followed?

Did the shock following the wound have any relation to the shock following the surgical operation and the resulting death?

Was a certain wound the cause of death?

Was the wound the immediate or remote cause of death?

Was death caused by the wound or by disease?

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[3] Crum *v.* State, 64 Miss., 4.

Where the deceased was afflicted with a mortal disease and was injured, death following, which was the cause of death?

Was a certain wound accidental, suicidal or homicidal?

Which wound was the primary cause of death?

(a) Where more than one was necessarily fatal.

(b) Where no one was necessarily fatal.

Was a certain wound inflicted before or after death?

What was the probable direction of the violence?

If gun-shot wound, what was the probable distance of the weapon from the body at the time of the discharge?

What was the caliber of the weapon?

What was the character of the missile?

Could a certain wound have been self-inflicted?

Could two wounds, both of which were necessarily fatal, have been self-inflicted?

Result of Treatment.—The mere fact that a good result is not obtained in the treatment of a wound, is, of itself, no evidence of negligence or lack of skill or care on the part of the physician, but where these facts are claimed to have existed, the patient must show them by affirmative proof, by the testimony of experts skilled in the profession.[4]

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[4] Moline *v.* Christie, 180 Ill. App., 334, 338.

CHAPTER XXIII

BLOOD STAINS

Blood is the fluid which circulates in the arteries and veins of animals.

Classification.—From the standpoint of histology, it is usually classed as a tissue. Its inter-cellular substance is fluid, while in other tissues this substance is solid.

Origin.—It is developed from the middle layer of the embryo.

Color.—In vertebrates, except amphioxis, the blood is red; in other animals, it is of various colors,—red, colorless, bluish, greenish, milky, etc. In the human and in most craniota, venous blood is dark red and arterial blood is bright scarlet.

Specific Gravity.—Human blood has a specific gravity of about 1.055.

Quantity.—In quantity, the blood of the healthy, normal human is about one-eighth the weight of the person. One author gives it at only one-thirteenth.

Composition.—The blood is primarily composed of a fluid known as liquor sanguinis, or plasma, in which float myriads of small semi-solid corpuscles and platelets. The proportion in bulk of the fluid to the solids varies from equality to about two to one. In a cubic millimeter of healthy normal human blood, there are about 5,000,000 of these corpuscles.

KINDS OF CORPUSCLES.—There are two kinds of corpuscles, red and white, and while the proportion varies through a wide range, in health and disease, there are about 350 times as many red as white corpuscles.

Red Corpuscles.—The blood derives its color from the innumerable red corpuscles which it contains. These red corpuscles are flat, bi-concave discs, non-nucleated and almost always round in mammals, and nucleated and almost always oval in other craniota. In man, their larger diameter averages about 7.5 micro-millimeters (1/3400 inch), while in amphiuma and tridactylum, the longer diameter is 67.22 micro-millimeters (1/363 inch). In their narrow diameter or thickness these discoid bodies are about one-fourth as large. The redness characteristic of these discoid cells is not manifest when examined singly, at which time they appear of a light straw color. The color is due to hemoglobin, which constitutes about ninety per cent of the dried substance of a cell. The red corpuscles are embryologically of mesoblastic origin, beginning their life history as nucleated cells and as such, possessing amœboid movement and reproductive powers. At birth, however, all nuclei have been lost by them, as well as all power of movement and reproduction. After birth, the production of new red corpuscles is believed to occur mainly in the marrow of the bones.

White Corpuscles.—The white corpuscles are slightly larger than the red and average about eight to ten micro-millimeters in their larger diameters. They are nucleated, and the protoplasm of the cell-body is more or less granular. Their shape varies, due largely from their amœboid movement. They accomplish some locomotion by the same movement. In this way they pass through the walls of the capillaries into the tissues, where they are known as wandering cells. Embryologically, the white corpuscles are derived from the mesoblast. New white cells are derived by reproduction, which seems to take place largely in the lymphatic organs, especially the spleen.

PLASMA.—This fluid portion of the blood consists of water containing calcium salts, the chlorides of sodium, potassium, phosphates, albumen and other proteid substances, as well as fatty and extractive substances.

PLATELETS.—The platelets are small, non-nucleated, round or oval bodies, about one-third the diameter of a red corpuscle. They are usually found in groups, and are prone to disintegration. Their function is unknown, but there is reason for believing that they are concerned in the process of coagulation when it occurs.

Hemoglobin.—Hemoglobin is a very important substance found in the red corpuscles, and has the property of readily taking up oxygen from the lungs and as readily giving it up to the tissues of the body. Its known characteristics make it an important factor in the identification of blood and blood-stains. On exposure to the air, it quickly crystallizes. Crystalline hemoglobin is dark red in color, differing somewhat with the direction from which the crystals are viewed, is readily soluble in cold water and imparts its color to the solution. The crystals combine freely, not only with oxygen, but also with nitric oxide, carbon monoxide and probably carbon dioxide.

Hematin.—After long exposure to the air, hemoglobin is changed to hematin, a bluish-black substance, which is insoluble in water and in the ordinary organic solvents, but which dissolves readily in alkaline solutions. Hematin is extremely stable, chemically; the caustic alkalies, hydrochloric and nitric acids have no effect on it and it does not decompose even at as high a temperature as 180 degrees Centigrade. Under ordinary conditions it retains its chemical indentity indefinitely.

Oxy-hemoglobin.—Oxy-hemoglobin is a crystalline compound of oxygen and hemoglobin, and the crystals thereof have a bright scarlet color like that of arterial blood.

Coagulation.—If blood escapes from the body, coagulation or clotting occurs. After standing awhile, the blood separates into a dark and semi-solid mass, the *clot,* and a thin red fluid, the *serum.* The clot is composed of red blood corpuscles matted together with fibrine. The process of clotting is accelerated by cold and retarded by heat. It may occur in the blood vessels from obstruction or infection, or in the neighboring tissues where a vessel has been ruptured. After death the blood remains fluid in the capillaries, but clots in the veins. Clots are sometimes found in the cavities of the heart.

Tests for Blood.—There are several tests recognized and practiced to determine whether certain substances or certain stains are of blood origin. These tests are based upon ascertained characteristics of blood, or of some of its component parts.

The tests may be classified as (1) physical, (2) chemical and (3) biological. The physical test consists of several different experiments; such as (a) the heat test, (b) the microscopic test, (1) for corpuscles and (2) for hematin crystals and (c) the spectorscopic tests. There are three forms of the chemical test, namely, (a) the ammonia test, (b) the potassium-hydrate test, and (c) the guaiacum test. These tests collectively will distinguish blood from other substances with great accuracy under favorable conditions, but do not with certainty differentiate between human blood and the blood of some animals. The value of the tests depends upon the skill of the analyst.

ACCURACY OF TESTS.—Some of these tests are remarkably delicate, and their combined results and eliminations approximate certainty. From as small a quantity as 1/1000 of a grain of dried blood, crystals of hematin hydrochlorate have been obtained. Owing to the stability of hematin, it makes little difference as to the age of the stain. In 1819, Kotzebue was assassinated at his desk in his own house by Sand, and the papers upon his desk were stained with his blood. In 1879, crystals of hematin hydrochlorate were obtained from these stains. Accurate as these tests may be for ascertaining the presence of blood stains, they are not infallible in practice. The person making the test may prove unskilled or negligent; he may even be biased or suborned. The difficulty of getting sufficient suspected material and of putting it in condition to make the test is often very great and may sometimes lead to precarious results.

Biological Tests.—The biological test is based upon the fact that when a sterilized solution of the blood of one animal is injected into the veins of a different species of animal hemolysis is induced, but if the animal treated be of the same species as the animal whose blood is used such disintegration will not take place. The difficulty in this test lies in the impracticability of finding the subject to be treated. This test has been so far experimented with that we have learned that the blood of the anthropoid ape gives the characteristic human reaction, but that the blood of the lower monkeys does not. A sterilized solution of human blood injected into the veins of the higher type of apes does not occasion disintegration or destruction of the corpuscles, but a different condition arises when the test is made upon the lower types of monkeys. If future experiments bear out the results of present investigations along this line, it would seem that a party who has had the proper experience, with sufficient materials, could determine with great accuracy the origin of a certain blood solution.

Color of Blood Stains.—The color of blood stains depends upon a variety of circumstances, among them being their age, their thickness, their origin, the material upon which they are found, etc.

Use in Criminal Law.—Blood stains have always been recognized among the ordinary indicia of crime, and they frequently afford important evidence in homicide cases.[1] To determine whether such stains are human blood is often a vital question in a criminal case. Two questions are always presented for solution, namely, (1) Is the solution in question blood, and (2) Is it human blood? A negative answer to the first question also negatives the second, and the inquiry need go no further and any inference of guilt arising from the presence of the stain is completely refuted. Some of the evidence to establish the first condition, that is, whether the given stain is blood, is a matter of common observation and everyday experience, but by the aid of science many effective means of distinguishing the same are available to the investigator and, therefore, are seized upon by the courts whenever the issue is involved.

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[1] People *v.* Fernandez, 35 N. Y., 60; Com. *v.* Tolliver, 119 Mass., 312.

Testimony.—An ordinary witness who has observed a substance or stain and formed a conclusion from his observation, may testify that it is or is not blood. Some courts, however, limit such witness to the statement that it "looked like blood," or "appeared to be blood."[2] In the latter case, an ordinary witness, having examined the blood under a microscope, based his conclusion partly upon such examination. The opinion of a physician is competent evidence. He is always permitted to state that a certain stain *is* blood.[3] The testimony of a physician was admitted to show that, upon examination by means of the microscope, certain spots were found to be human, as distinguished from animal, blood.[4] Such testimony was admitted to show that of certain spots found on a board, some were human blood and some were hog's blood.[5] Again, the testimony of a physician was admitted to show that a stain on a shirt was occasioned by the blood flowing directly on the outer surface, as shown by the fact that the coloring matter of the blood remained on the outer surface.[6] In the latter case, the defense attempted to show by the testimony of physicians that the location and appearance of the blood marks on the shirt of the defendant demonstrated that the defendant was probably prostrate on the ground and deceased on top of him when the stains on the shirt were received. The court held that this was not a matter of medical testimony, as it merely involved a question of gravity.

It has been said that the testimony of a chemist who has analyzed the stain, and that of a person who has merely observed it, belong to the same legal grade of evidence.[7]

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[2] People *v.* Bell, 49 Cal., 485; State *v.* Robinson, 117 Mo., 649, 663; Com. *v.* Sturtevant, 117 Mass., 122.

[3] State *v.* Knight, 43 Me., 132; Lindsay *v.* People, 63 N. Y., 143.

[4] Knoll *v.* State, 55 Wis., 249.

[5] Lindsay *v.* People, 63 N. Y., 144.

[6] State *v.* Knight, 43 Me., 132; Dillard *v.* State, 58 Miss., 370.

Demonstrative Evidence.—Articles having spots on them resembling blood are competent evidence to go to the jury, when connected with the subject of the inquiry.[8]

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[7] People *v.* Fernandez, 35 N. Y., 61.

[8] State *v.* Baker, 33 W. Va., 319; Thomas *v.* State, 67 Ga., 460.

CHAPTER XXIV

CRIMES WITH MEDICAL ASPECTS

Introduction.—While all offenses of violence against the person may involve medical evidence, there are some crimes in which the services of medical science are sometimes indispensable to the administration of justice. The essential element of the offense may rest entirely on medical evidence. There will be no attempt made to illustrate and detail the character of the medical evidence which may be present in special offenses and particular cases, and where such evidence is referred to, the reference is made in order to illustrate the legal principles involved, the importance of the medical evidence and its relation to the administration of law. Most treatises on medical jurisprudence, especially those prepared by medical men, discuss only the medical side of these cases, and to them the reader is referred.

Rape.—*Rape is the carnal knowledge of a female forcibly and against her will.* Where the female is under the age of consent, there need not be any force and the act may meet with her approval, or even be brought about at her solicitation.

Age of Consent.—At common law the age of consent was ten years, but the subject is now generally regulated by statute and the age fixed varies from ten years, in some states, to eighteen years in other states.

Punishment.—Rape is regarded as a most brutal and infamous crime and in all civilized communities the penalty is justly severe. On the high seas and in places within the exclusive jurisdiction of the United States, is it punishable by death.

Physical Violence.—Where physical violence is the means employed to perpetrate the crime, the female must resist her uttermost and to the last, and herein many delicate medical questions may arise and should be given proper consideration.[1]

FORCE.—The kind and degree of force used is not material, if it be sufficient to overcome resistance. It may be physical violence, fraud, deception, as by impersonating her husband, intimidation by threats and through fear of personal injury or public scandal, the administration of drugs or gases producing anesthesia or exciting sexual passions, taking advantage of natural sleep, hypnotic influences, or any of the countless artificial means whereby a woman's power or desire to resist may be overcome. The gist of the offense is the having sexual intercourse *without her consent* or, what amounts to the same thing in law, at a time when, because of a natural or artificial, permanent or transient, mental condition she was incapable, in fact or in law, of giving consent. Since defloration of a female under the influence of an anesthetic is rape, and the gravamen of the offense is the violation of the person, the intent with which or the person by whom the anesthesia is induced is unimportant. Whether the stupefaction was brought about at her request to relieve the pain of an operation, or without her consent to excite her sexual passions, leading to voluntary submission, or to overcome her power of resistance to the assault, where intercourse occurs, the offense is rape.

Previous Unchastity of the Woman.—The previous unchastity of the woman is immaterial, except as it (a) affects her credibility, where the act is denied, or (b) bears upon the question of consent, where the act is admitted.[2]

Signs.—The characteristic signs of rape are numerous and usually easy to discover. When called on a case involving a charge of defloration of a woman the physician should take every available precaution to locate and verify the medical evidences of the offense. The condition of the woman's clothing, the appearance of her sexual organs, the presence of seminal fluid, and all other special facts indicative of sexual intercourse, with or without force, should be specially noted and classified.[3] It is needless to say that a thorough physical examination of the woman, and tests for spermatozoa, when possible, are indispensable to the ends of justice.[4] As a matter of fact and law, the crime may be consummated without a rupture of the hymen, but all circumstances must be considered before forming an opinion.[5]

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[1] Rahke *v.* State, 168 Ind., 615; Brown *v.* State, 127 Wis., 193; Adams *v.* People, 179 Ill., 633.

[2] Carney *v.* State, 118 Ind., 525; Maxey *v.* State, 66 Ark., 523.

Poisoning.—*Poison is any substance which, when introduced into the animal organism, produces morbid, noxious or deadly effects, or is injurious to health or life.*[6] *Poison* imports, *ex vi termini*, a substance which has fatal properties when introduced into the animal system.[7] Whether a given substance is poison is always a question of fact, and may involve a chemical analysis or other scientific demonstration.[8]

Malice.—The intentional administration of a poison for any wrongful purpose implies malice.[9]

Absorption.—Except in the case of corrosives, poisons must be distributed to different parts of the body in order to produce their injurious effects; that is, they must be absorbed. Where the symptoms of death are not known, the presence of arsenic in the stomach alone, found on postmortem, would not establish death from that poison. The blood, the urine and other secretions, the liver, spleen, kidneys, lungs and other viscera should be analyzed for the presence of the poisonous substance.

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[3] Com. *v.* Lynes, 142 Mass., 577.

[4] State *v.* Tuipner, 36 Minn., 535; State *v.* Murphy, 118 Mo., 7; State *v.* Perry, 41 W. Va., 641.

[5] State *v.* Hargrove, 65 N. C., 467; Braner *v.* State, 25 Wis., 413.

[6] State *v.* Baldwin, 36 Kan., 20; People *v.* Van Deleer, 53 Cal., 149.

[7] State *v.* Slagle, 83 N. C., 130.

[8] Com. *v.* Kennady, 170 Mass., 25.

[9] Siebert *v.* People, 143 Ill., 571.

Common Law.—At common law, administering poison was assault and battery with intent to kill and, if death resulted, the offense was murder.

Post-mortem.—If the evidence of the administration of a specific poison is positive and the symptoms established are characteristic, there may be a conviction without the aid of a post-mortem,[10] but wherever possible an autopsy should be held, and the investigation should go to the extent of ascertaining, not only the presence of poison in the tissue, and the kind, but also as to whether there was sufficient, under the circumstances, to cause death. Where there is no direct evidence of the administration of the drug, its presence in the tissue after death, in sufficient quantities to occasion that event, is very essential to a conviction of the offender.[11] In cases of poisoning, most questions involving the science of medicine are purely medical, not legal, and for the medical evidence of death or injury by poisoning, the reader is referred to medical treatises on the subject. The symptoms of death from certain well-known poisons are so familiar to the profession that, in some jurisdictions, a general practitioner may testify that the given symptoms are those of a certain poison and, with sufficient other facts given to enable him to form an intelligent conclusion, he may state that in his opinion death was caused by such substance, even though he never had a case of such poisoning in his practice, because he is not confined to information derived from observation and experience, but may base his opinion on knowledge derived from medical works and other sources.[12]

If, on an autopsy, arsenic is found in the stomach of the subject, careful examination of the walls of that organ, when possible, should be made for the characteristic evidence that the poison entered the stomach before death. In prosecutions under statutes penalizing the administration of poisons, the evidence must show that some of the poison entered the stomach. If taken in the mouth only, it was not administered within the meaning of such laws.[18]

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[10] Polk *v.* State, 36 Ark., 117.
[11] Hatchett *v.* Com., 76 Va., 1030.
[12] Siebert *v.* People, 143 Ill., 571, 579.

Murder by Poisoning.—To sustain an action for murder by poisoning, three things must be established beyond a reasonable doubt:

1. That the deceased died by a poison. This fact may be proved by direct, positive evidence when such evidence is available, but as the offense is almost invariably committed by stealth, the usual obtainable proof is circumstantial in character, and here is where the services of the physician and specialist are sometimes indispensable. There are at least two distinct kinds of circumstantial evidence from which the fact of death by poisoning may be deduced:

(a) By the observed appearances and symptoms before and after death;
(b) By analysis,—(1) of a sample of the substance known to have entered the body; and (2) of parts of the body, its secretions, etc.

2. That the poison in question was administered directly or indirectly by the accused. Here, again, the fact can seldom ever be established by direct evidence, and resort must again be had to circumstances from which the guilt of the accused may be reasonably inferred. There may be persent several circumstances persuasive of guilt in this regard, and among them may be mentioned:

(a) Possession by the accused of the particular poisonous substance prior to the probable time of administration;
(b) Opportunity of administration by the accused;
(c) Motive, expressed intention or other antecedent probability of that character;

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[18] 31 Cyc., 898.

(d) Improbability of administration by other agencies, and

3. That the accused had knowledge of the probable effects of the substance and administered it with felonious intent.

Infanticide.—Infanticide is the criminal destruction of a new-born child. It is a term applied to the *act of taking the life of an infant at the time of birth, but after it has established an independent existence.* The destruction of a fœtus, even though partly delivered is not infanticide and, at common law, was only a misdemeanor, while, on the other hand, if the child has lived a sufficient length of time under circumstances to establish its independent existence by other evidence than that disclosed by the corpse itself, such as witnesses who saw and heard the child and other evidence of the presence of a living infant, its destruction would not be classified as infanticide, but as a plain case of homocide. Such prosecutions are usually directed against the mother, but any other person who is present may be guilty of the offense. The subject is of special interest to the physician because of the great number of medical questions involved as essential elements of the crime. If the child has established an independent existence, the willful taking of its life will be murder and will subject the offender to the penalties of such offense, but if it still depends upon its mother for life, its destruction will only be a misdemeanor, hence the importance of knowing and proving to which class the act in question belongs. However, the killing of an unborn quick child is now generally declared a criminal homicide by statute. But in the absence of statute, such act is only a misdemeanor.[14]

Duty of the Mother.—What duty does a mother owe her unborn child? Does that duty increase or vary between the instant of conception and the moment of final parturition? These questions the law has wisely left, in a large measure, to the instincts of the race. Whatever may be the mother's obligations in the premises, the law has never undertaken to outline or classify them. Her sense of right and the instinct of self-preservation, have, in a great measure, been relied upon, without supervision or mandate, to protect society in so for as the public is interested in the subject. From the earliest time, however, she was held accountable for its willful destruction after "quickening," it being supposed that at that time the child had life and power of muscular movement.

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[14] Williams *v.* State, 34 Fla., 217; Evans *v.* People, 49 N. Y., 86.

Prevalence.—The offense is apparently much less prevalent than formerly. In fact it is now almost unknown, a mere nightmare of bygone ages, and, like many other delinquencies, lies entombed in the musty records of human frailties, serviceable only to the antiquarian and the purveyor of human follies. We should not, however, flatter our generation by inferring that such fact is due to any great improvement or change in the morals of society in the meantime. The explanation is more likely to be found in the increased and more prevalent knowledge of means of preventing conception and of procuring the expulsion of the unwelcome intruder before maturity without positively jeopardizing the life of the mother. The human heart with its weaknesses and follies is, in all ages, about the same.

Intent.—Intent to take the life of the infant must be proved. The evidences of intent are generally circumstantial and often of a nature to be explained on the hypothesis of ignorance, accident or natural causes. Here is where the ingenuity of the medical man is taxed to find the true facts in the case. Mere voluntary exposure of herself by the mother at the time of the delivery, for the purpose of concealing her shame and which, without other fault on her part, results in the child's not surviving the ordeal, or mere failure on her part to get assistance at the time, would not be sufficient to establish intent.

Independent Existence.—What constitutes being born alive and having an independent existence is a question involved. All authorities agree that the offense cannot be predicated unless the child had completely proceeded in a living state from the body of the mother. At least two conditions of fact must also exist:

(1) The child must have been alive;

(2) It must have had an independent circulation, and according to some authorities,

(3) It must have breathed.

But if these conditions existed, it makes no difference whether—

(1) It was still attached to the mother by the umbilical cord, or, according to some authorities,

(2) It had breathed or not.

It has been held that a child is born alive when, breathing and living by reason of breathing through its own lungs alone, it exists as a live being without deriving any of its living, or power of living, by or through any connection with its mother.[15]

Severance of Umbilical Cord.—According to English authorities birth is complete when the child has been wholly expelled from the body of the mother, even though it is still connected with her by the umbilical cord.[16] However, it would ordinarily seem the more correct position that birth is not complete until the child has an independent circulation and breathes through its own lungs. If circulation has been set up, the mere continuity of the funis is unimportant. Independent circulation should be one of the tests and as soon as that condition exists, with power to purify the blood in its own lungs, shown by respiration, the child may be said to have complete, independent existence.[17] Circulation and respiration are essential functions of animate life and, until both have been established, there is not a complete self-sustaining organism.

Medical Evidence of Independent Existence.—The medical evidence that a child was born alive and had an independent existence is derived,—

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[15] Reg. *v.* Hindley, 13 Cox, C. C., 79; State *v.* Winthrop, 43 Ia., 519.

[16] Reg., *v.* Trilloe, 41 E. C. L., 352.

[17] State *v.* Winthrop, 43 Ia., 519.

1. From an inspection of its general appearance and
2. From the conditions of—
    (a) Respiratory Organs,
    (b) Circulatory System, and
    (c) Abdominal Organs.

(a) RESPIRATORY ORGANS.—Where breathing has occurred, the respiratory organs offer the most reliable proof of live birth. The thorax is higher or more vaulted in appearance than where the child has not breathed, and the diaphragm is more depressed after respiration than before. After breathing, the larynx is wider and is not closed by the epiglottis.

Hydrostatic Test.—The hydrostatic test, celebrated in the history of infanticide, is based on the fact that the lungs in their fœtal or unaërated condition sink when placed in water, while the lungs of a child that has breathed (or where they have been otherwise inflated) float in water. This test for infanticide was, for several centuries, regarded as decisive by men of distinction who had thoroughly experimented on the subject, but some writers of experience and authority are opposed to the test as fallacious, Baron Garrow styling it "scientific humbug."[18]

Breathing.—It is a well recognized fact that some children breathe before complete expulsion and, on the other hand, instances are not wanting in which breathing does not commence until some time after complete parturition. Therefore, the fact that a child has breathed does not necessarily prove that it was born alive,[19] nor, on the other hand, does the fact that the child never breathed prove that it was not born alive.[20]

(b) CIRCULATORY ORGANS.—The condition of the circulatory organs may assist in arriving at the fact of independent existence. The condition of the foramen ovale and the ducti arteriosus and venosus is probative of independent breathing and circulation, but their presence in the fœtal condition does not conclusively negative independent existence.

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[18] Dole *v.* Johnson, 50 N. H., 452.
[19] Rex *v.* Wright, 9 C. & P., 754.
[20] State *v.* Winthrop, 43 Ia., 519.

(c) Abdominal Organs.—In the fœtus the liver is relatively enormously large and very vascular. If the child has partaken of any food, the stomach and intestinal canal may afford proof thereof, by reason of the presence therein of food, milk or farinaceous or saccharine matters, from which life is necessarily inferred. Other medical facts will readily occur to the alert and skilled physician.

Natural Causes of Death.—The natural causes of death during birth and in new-born children is a subject of great importance in medical jurisprudence. The principal causes acting during birth and immediately subsequent thereto are,—

1. Compression of the umbilical cord,
2. Strangulation by the umbilical cord,
3. Hemorrhage from the umbilical cord,
4. Suffocation by the amniotic membrane,
5. Malformation of the mother,
6. Protracted delivery,
7. Constitutional debility of the infant, and
8. Accidental fractures.

The scar or mark left by strangulation by the umbilical cord can usually be readily distinguished from the mark left by strangulation by a rope or string, as the funis never leaves any mark of excoriation or cutting of the skin, the mark being broad, smooth, uniform and without break. Hemorrhage from the cord and consequent death may occur from accidental rupture during delivery, or it may occur after severance, with or without a criminal design. Stillbirths are not unknown. A child often dies of constitutional feebleness. An inspection of the body will frequently warrant this conclusion where there is no other apparent cause.

In the case of Reg. *v.* Middleship, reported in Cox's Criminal Cases, 275, the evidence tended to show that the child had dropped from the mother while she was in a privy. Other similar instances are not wanting in the experience of medical men, and they show that in cases of concealed birth where there is a fracture of the skull, it may possibly be due to accident and not to a criminal act. Therefore, the medical man seeking to find out the right should, by his investigation, negative all possible accidents and natural causes.

Identity of Mother.—The identity of the mother may be an issue in the case. Where such fact is at issue, a physician, from proven symptoms and history shown, or from his own examination of the defendant, where such has been made, may give his opinion as to whether the defendant, had been delivered of a child and how recently.[21] When the other evidence of the identity of the mother is only circumstantial, the medical evidence of pregnancy and delivery, or their absence, becomes very important in determining the right of the case.

Burden of Proof.—It has been stated by writers of authority that about one in every twenty legitimate children is born dead while, in illegitimates the proportion is about one in every ten. We may not agree on the proportions, but all persons of experience must agree on the fact that many children are born dead, even in the absence of any criminal act on the part of the mother or other person. This fact, therefore, is an important consideration in determining the guilt in charges of infanticide. In all prosecutions for crime the defendant is presumed to be innocent until he is proven guilty, and the jury must be satisfied beyond reasonable doubt. No man can honestly be satisfied beyond reasonable doubt where the chances are one in twenty that he is wrong. Therefore, in cases of infanticide, the prosecution has the burden of proving *that the child was born alive.* In practice, this means that the prosecution is put to the necessity of *producing some evidence* that the child did have an independent existence.

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[21] Echols *v.* State, 81 Ga., 696.

STATUTES.—During the reign of James I, a statute was enacted making concealment of the death of a bastard child *prima facie* evidence of murder by the mother, but she could overcome the presumption by the testimony of one reputable witness that the child was born dead. By a statute of Pennsylvania passed May 31, 1781, such concealment was conclusive evidence against the mother.

CHAPTER XXV

STATUTES OF LIMITATIONS

Policy of the Law.—*It is the policy of the law to discourage the litigation of stale matters.* Such policy was originally adopted to discourage perjury by trying issues when the facts were fresh in the memory of the witnesses and the falsity of testimony could more readily be proved. Statutes of limitations are universally in effect whereby the time within which actions may be brought is designated with reference to the time the cause of action accrued.

When Cause Accrues.—The question of when a cause of action accrues is often difficult to determine, and has led to innumerable interpretations by the courts. At the time a party has a right to demand fulfillment of an obligation by another, his right of action is complete and is said to have accrued. When a cause of action accrues the statute is said to begin to run. In actions for personal injuries, the statute begins to run at the time the injuries are received.[1]

Malpractice Cases.—As a general proposition, in malpractice cases, the cause of action accrues at the time the alleged improper services were rendered. Thus, where the negligence and unskillfulness of a surgeon in treating a fractured arm were the gist of the action, it was held that the statute began to run at the time of the discharge of the case after the setting of the arm, where the facts showed that the wrongful setting was the real and substantial cause of complaint.[2]

Period of the Statutes.—In some States actions in tort for malpractice must be begun within one year from the accrual of the cause of action. In other states it is two years. Most statutes favor actions on contracts by giving them a longer period to run. Under such statutes, an action for breach of contract by malpractice may be maintained, after the statute has run against the tort action.

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[1] Fadden *v.* Satterlee, 43 Fed., 568.

[2] Coady *v.* Rens, 1 Mont., 424.

Diligence.—It is not the policy of the law to refuse redress to an injured party who has a just cause of complaint. Diligence in enforcing remedies is the purpose of the statutes under consideration. A party must not sleep on his rights. Reasonable promptness in appealing for redress is encouraged and, in fact, demanded. However, a party cannot be said to sleep on his rights before he knows that he has suffered injury at the hands of another. Generally, in matters of malpractice, the time when the action accrues is always manifest and self-evident, as there can be no mistaking exactly when the wrong was done and the injury inflicted. The presence of the injury is a continual reminder of the wrongful conduct. But cases there are which are not free from doubt and uncertainty. Take the case of a course of treatment by a physician, which was clearly wrong from the beginning and resulted in injury to the patient. Should the statute begin to run with the first treatment or at the termination of the relation? Is not the wrong a continuous one? Is there not a breach of duty at the last as well as at the first, or at any intervening visit? So long as the improper treatment continues there is a continuing breach of the duty which the practitioner owes to his patient.

Specified Services.—Where there is an agreement for certain specified services, covering a period of time, the statute should not begin to run until the services have been completed, or the relation terminated in some other manner.[3] It would appear that this proposition should not apply where the ground of complaint was for some known improper conduct which, to the knowledge of the patient, could not be remedied by subsequent proper attention and treatment. Thus, the wrongful amputation of a limb where such operation was clearly unnecessary and ill-advised, would create a cause of action at that time and the statute should begin to run at the time of the act regardless of the subsequent conduct of the operator.

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[3] Gillett *v.* Tucker, 67 O. St., 106; L. R. A., 1917 C., 1173.

Knowledge of Injury.—It has been held that the breach of duty constitutes the ground of complaint and causes the action to accrue,—not knowledge by the plaintiff of the fact of the wrong evidenced by the resulting injury.[4] The statute begins to run at the time the injury is inflicted, notwithstanding the results may not be fully developed until long after.[5] Thus, malpractice in the delivery of a woman, whereby the child is injured, dates from the time of the delivery, although the serious consequences of the negligence to the child are not apparent for several years thereafter.[6]

Latent Injuries.—General laws cannot cover every possible contingency. They are made with reference to usual experiences. Exceptional cases must be reached by interpretation, when within the purview of the act and by new legislation, when they are not. The statutes under discussion have been enacted with the unexpressed assumption that the party wronged knows of his injury at the time of its infliction. In most cases of malpractice this is not a violent presumption because, in fact, it is in harmony with the circumstances. The man with a deformity occasioned by an improper setting of the parts, by the surgeon, knows of the blunder at the time and is continually reminded of the wrong which was done him, and of the breach of duty by his surgeon. Cases there are, however, where the injury is inflicted and the patient does not know it, and from the very nature of things cannot know at the time that he has been wronged. The law is not intended to protect the wrongdoer who successfully covers up his misdeeds, nor the party whose negligence of omission is concealed by the nature of his dereliction. Thus, the patient in whose abdomen an operating surgeon has left a sponge, absorbent cotton, a pair of scissors or other foreign substance, may be ignorant of the fact until years after when, driven by excruciating pain to undergo another operation, the presence of the intruder is disclosed. There can be no reason for encouraging promptness of action where the party is ignorant of any wrong having been done him. Promptness presupposes knowledge of the existence of the matter to which it relates.

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[4] Frounce *v.* Nichols, 22 O. C. C., 539.

[5] Fadden *v.* Satterlee, 43 Fed., 568.

[6] Miller *v.* Ryerson, 22 Ont. 130, 369, 179. *But see* Hahn *v.* Claybrook,—Md.,—; 100 Atl., 83; L. R. A., 1917 C., 1169.

Continuing Obligations.—Where a physician operated upon a patient for what he pronounced to be appendicitis, and neglected to remove from her abdominal cavity a sponge which he had placed therein, in connection with the operation, and this condition continued during his entire professional relation to the case, it was held that the statute of limitations did not commence to run against the right to sue and recover on account of want of skill, care and attention, until the case has been abandoned or the professional relation was otherwise terminated. There was an agreed consideration in this case for the operation itself, and also for such treatment as might be necessary thereafter, and the contract was regarded as an entirety. The obligation on the part of the physician to use due care and diligence, in order that recovery might be had, existed, therefore, as long as the relation of physician and patient continued. "It was a constant and daily obligation to use ordinary skill and care and if, by omission or negligence he had left a foreign substance within the walls of the incision at the time of the operation, it behooved him to afford timely relief. Neglect of this duty, imposed by the continuance of the obligation, was a continuous and daily breach of the same and, as the facts show, caused continuous increasing daily and uninterrupted injury." It will be observed that in this case there were two distinct grounds on which to base complaint against the surgeon:

First: *Negligently permitting the sponge to remain in the cavity when closing the incision,* and

Second: *Negligently allowing it to remain there from day to day until he dismissed his patient from his attention.*

The neglect by the surgeon was inherent in the *operation,* and also in the subsequent *treatment.*[7]

A Continuing Wrong.—Sponge cases and others of that type are in reality continuing breaches of the obligation which the operator owes to his patient. If the surgeon knew of the presence of the foreign body and purposely, with or without malice but without sufficient reason, improperly permitted it to remain, his conduct in that respect would amount to an assault. If he did it through negligence, the law would charge him with knowledge, for he should have known, and the legal consequence as to his liability would be the same. In either alternative the act amounts to a continuing assault, each recurring pain being a new breach of duty by the operator, and the statute should not begin to run until the discovery of the fact by the patient, or until, in the exercise of reasonable care and due diligence, under the circumstances, the patient should have discovered his real condition. If the object is removed by the offending surgeon, the statute should not begin to run until after such removal and the disclosure of such fact to the patient.

Constructive Discovery.—The rule of constructive discovery should not apply to sponge cases in surgery, and the Statute of Limitations should not begin to run until actual discovery of the object.[8]

Suit for Fee.—When a physician delays action for his fee until after the statute of limitations has run against an action in tort by his patient for malpractice in reference to the same services, the patient may, nevertheless, show the malpractice as a defense to the physician's claim even though the fee had been agreed upon before the services were rendered. Under such circumstances, generally speaking, the patient is limited to the defeat of the physician's claim; he cannot recover affirmatively against the physician. However, the decisions are not in harmony on this subject, and the reader is referred to the decisions of the state in which he is interested.

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[7] Gillett *v.* Tucker, 67 O. St., 106; Cf. Hanger *v.* Abbott, 6 Wall., 532.

[8] Miller *v.* Cloney (Kas.) 256 Pac. 159.

Persons Under Disability.—The statutes usually except minors, insane persons and others under disability, and give them a certain period, usually a year, after the removal of the disability in which to begin suit. Therefore, in case of malpractice on a minor, the possibility of litigation is not ended until a year or more after the patient attains his majority.

CHAPTER XXVI

MISCELLANEOUS

Work on Sunday.—In contemplation of law Sunday is merely a *day of rest*. In this country there is no attempt by law to ingraft upon the day any religious aspect. While all religious faiths are regarded with respect, the law does not attempt to enforce any religious observance of the day nor to treat it as a religious institution. Sunday, as a Christian institution, is a development from the Jewish Sabbath, or day of rest.

Duration of the Day.—At common law, the natural and civil day consists of twenty-four hours, extending from midnight to midnight, while the artificial or solar day extends from sunrise to sunset.[1] Some statutes relating to work on Sunday have been construed to mean the solar day, from sunrise to sunset.[2] As used in such statutes, however, the more general interpretation of Sunday is that it means the civil day of twenty-four hours, extending from midnight Saturday to midnight Sunday.[3]

At Common Law.—For centuries Sunday has been considered a non-judicial day. By a canon of the Church ingrafted on the common law all judicial proceedings which took place on that day were void; however, all other business might lawfully be transacted on that day. Thus, a contract executed on Sunday is not void at common law, by reason of having been entered into on that day.[4] The common law does not prohibit ordinary labor or secular work on Sunday.[5]

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[1] Hiller *v.* English (S. C.), 4 Strob., 486.

[2] Fox *v.* Abel, 2 Conn., 541.

[3] State *v.* Green, 37 Mo., 466, 470; Schwab *v.* Mayforth, 1 City Ct. (N. Y.), 177, 179; State *v.* Heard, 107 La., 60; Shaw *v.* Dodge, 5 N. H., 462, 463.

[4] Richmond *v.* Moore, 107 Ill., 429.

[5] Eden *v.* People, 161 Ill., 296.

Statutes.—During the medieval period the authority of the Church was so universally recognized that secular legislation on the subject of Sunday observance appears to have been unnecessary. In fact the day appears to have been treated entirely as a religious institution. Apparently the first Sunday observance law which has exercised a direct influence on our jurisprudence was an edict of the Roman emperor, Constantine. This edict was based upon the pagan idea that Sunday should be venerated as a matter of religious duty to the god of the sun. By the statute of 5 and 6, Edw. V., Chap. 3., it was provided that all secular labor on Sunday should be unlawful except in cases of necessity. This statute was greatly enlarged by the Act of 29 Chas. II, Chap. 7, which prohibited all ''worldly business'' except when absolutely necessary or for charity. These statutes have been substantially enacted and followed in all the United States.

Having its origin in the law of England, the first Sunday observance law in America was passed by the colony of Virginia in 1610, and required faithful attendance twice a day on divine services on Sunday under penalty of death for the third unexcused absence. Originally these laws, wherever enacted, required of the citizen a certain religious observance of the day, but later, especially since the adoption of our Federal Constitution, most of them have been confined to a prohibition of certain secular work during the day, on the theory that such work interferes with proper observance thereof by those who desire to give it a religious significance.

Our courts have held that statutes prohibiting the execution of contracts, the transaction of business and the performance of secular labor on Sunday are a reasonable exercise of the police power for the protection, health and general welfare of society. A general law prohibiting the transaction of all business and the performance of all labor on Sunday, except work of necessity and charity is constitutional and enforcible.

Limited to Certain Callings.—However, where such statutes or ordinances single out a particular occupation whose exercise does not necessarily disturb the peace and good order of society, they are regarded as class legislation and will not be enforced.[6]

Construction.—Where statutes are limited to a prohibition of disturbances of the peace and good order of society by labor on Sunday, they are construed not to prohibit ordinary business transactions or professional work.

Work of Necessity and Charity.—The statutes of the various states prohibiting labor and the transaction of business on Sunday, naturally and necessarily except work of necessity, great public convenience and charity. What constitutes work of necessity and charity has often been before the courts and is not always easy to determine. The circumstances of each particular case must be taken into consideration. An act which would be considered a necessity under one set of circumstances, might be clearly prohibited under a different set of circumstances.

Meaning of Necessity.—Necessity, within the meaning of the law, is generally considered the moral and social fitness or propriety of the work or labor under the circumstances of the particular case.[7] The necessity referred to in the statute need not be an absolutely unavoidable physical necessity; a mere moral emergency which will not reasonably admit of delay is a necessity within the contemplation of such statutes.[8] It has been said that it is impossible to lay down any general rule as to work of necessity and charity, and also that the exigencies of human life, which demand work of necessity and charity, are so numerous and diversified by attending circumstances as to defy classification.[9]

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[6] Eden *v.* People, 161 Ill., 296.

[7] Flagg *v.* Mullbury, 4 Cush., 243; Johnston *v.* People, 31 Ill., 469.

[8] Burns *v.* Moore, 76 Ala., 339, 342.

[9] Johnston *v.* Com., 22 Pa. St., 102; Ungericht *v.* State, 119 Ind., 379.

SERVICES OF A PHYSICIAN.—The usual services of a physician are generally regarded as coming within the exception as work of necessity, and he may collect the usual reasonable fee for medical and surgical attention on Sunday.

Coroners.—*A coroner is a municipal or county officer who, in modern times, is charged with the duty of holding inquests upon the bodies of persons who may be supposed to have died violent, unnatural or extraordinary deaths.*[10]

DUTIES.—At the present time the duties and powers of a coroner are both judicial and ministerial; formerly, at an early date, they were exclusively judicial.[11] Wherever the circumstances surrounding a death are of such a character as to sustain a reasonable belief that it resulted from unlawful or violent means, an inquest should be held. The decision of the necessity therefor lies in the sound discretion of the coroner, which, ordinarily, will not be reviewed by the courts.[12] He cannot arbitrarily, capriciously, for an ulterior motive, and without any apparent reason, hold an inquest.[13] He has the power to summon witnesses and retain physicians to make examination and autopsy. In case of supposed violent, unnatural or extraordinary death, a coroner may, at his option, hold an autopsy to determine the cause, manner, incidents or circumstances of death without the consent or knowledge of the next of kin. His right arises out of his public or official duty, and justifies the act of the physician whom he commissions for that purpose. He can compel the attendance of a physician who knows the facts or has inspected the body and require him to give his opinion of the cause of death,[14] but he can not compel him to perform an autopsy as a basis for his opinion.[15]

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[10] Bouvier's Law Dictionary.

[11] 1 Bl. Com., 348; Yeargin *v.* Siler, 83 N. C., 348.

[12] Boisliniere *v.* St. Louis Co., 32 Mo., 375.

[13] Lancaster Co. *v.* Mishler, 100 Pa. St., 624; Clark Co. *v.* Calloway, 52 Ark., 361; State *v.* Marshall, 82 Mo., 484.

[14] St. Francis Co. *v.* Cummings, 55 Ark., 421.

[15] Allegheny Co. *v.* Watt, 3 Pa. St., 462.

Civil Liability.—The coroner is not civilly liable for slander for any remarks or instructions he may give the jury on the facts of the case under consideration, even though alleged to have been uttered falsely and maliciously.[16]

Boards of Health.—The preservation of the public health is a fundamental duty of the state as a sovereign power. As an inherent part of the police power, the state has a right to enforce quarantine, health and inspection regulations and laws to prevent the introduction of disease, pestilence, unwholesome food and prohibited articles. All reasonable regulations in these respects the individual must obey. The legislative department of the government determines what laws and regulations are necessary to protect and secure public comfort, convenience and health. The courts have nothing whatever to do with the wisdom, efficiency, or expediency of the measures adopted, and will interfere therewith only when the regulations are manifestly arbitrary, discriminatory, oppressive, or unreasonable. In the exercise of its police power, the legislature may enact general laws and create ministerial officials or boards of health, with power to determine and designate such diseases as are communicable and dangerous, contagious, or infectious, and to prescribe, within the law, rules with the force and effect of law, to impose penalties for their violation, and provide for their enforcement. Such action by the legislature is not a delegation of legislative authority. Such boards or officers usually have authority to isolate persons who endanger the public health by throwing off disease germs. A typhoid carrier may be quarantined. The delegation of power to designate dangerous, communicable, contagious and infectious diseases, is not a delegation of authority to make law, but merely of a right to find and promulgate a medical fact. Such finding cannot be reviewed by the courts. Every reasonable presumption and intendment is indulged in favor of the validity of the action of health officers. They may not act arbitrarily, nor of their own volition, unless they have reasonable grounds to believe the existence of the condition upon which, under the law, they have the right to act. Such regulations are based on necessity, and the right ceases when the necessity disappears. The individual can not be deprived of his liberty on a mere suspicion. Boards can not delegate their authority.[17]

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[16] Thomas *v.* Churton, 2 B. & S., 475.

Boards of health and other proper public authority may prescribe reasonable regulations for quarantining a typhoid carrier so long as he discharges germs of the disease.[18]

Civil Liability.—Where members of a board of health, in good faith, act in a judicial capacity, that is, in the exercise of a judicial power within their jurisdiction, they are not civilly liable personally to a party who claims to have been damaged by their decision or by the enforcement thereof.[19] In such cases there is no presumption in favor of jurisdiction and the board has the burden of showing that the matter in question was within their cognizance.

Liability of City.—A municipality in whose behalf a Board of Health acts is not liable for damages resulting from the negligent conduct of its members. Municipalities have two classes of power, viz: (1) legislative, public, governmental, in the exercise of which they represent the sovereign power, and (2) proprietary, quasi private, conferred upon it, not for the purpose of governing its people but for the private advantage of the inhabitants thereof as a legal personality. It is not liable in damages to an individual for injuries resulting from the negligence of its officers in the execution of the first powers, but it is liable in damages to an individual for injuries resulting from the negligent exercise of the second class of powers. Thus, in the collection and disposition of garbage a city acts for the public health and discharges a governmental function. In these acts it is an agent or arm of the commonwealth, a manifestation of sovereignty, and for that reason is absolved from liability for the negligence of its employees. Of course, the individual members participating in the wrongful acts, if not judicial in their nature, may be liable for the damages occasioned, depending upon the special circumstances of the case.[20]

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[17] People *v.* Robertson, 302 Ill., 422; 22 ALR, 1178; Rock *v.* Carney, 216 Mich., 280.

[18] People *v.* Robertson, 302 Ill., 422, 22 ALR, 835.

[19] Underwood *v.* Green, 42 N. Y., 140; Salem *v.* Eastern R. Co., 98 Mass., 431; Raymond *v.* Fish, 51 Conn., 80.

Duty of Parent to Employ Medical Services for Minor Child.—*It is the duty of a parent, or of one in loco parentis, to procure necessary medical treatment for his minor child and for any gross, willful neglect herein, he may be held criminally liable.*[21] The law is based upon the assumption that the medical services were a necessity and applies wherever the party sought to be held responsible is charged with the duty of supplying the minor with necessaries. However, a mere failure to provide medical aid is not usually considered a felony.[22]

Christian Science.—Conscientious scruples generally against the employment of medical assistance in case of disease or accident will not avail the responsible party as an excuse for the failure to procure such services. In this respect, the law enforces contemporaneous, prevailing, paramount public opinion and enlightenment. Whether the Christian Scientist be regarded as a survival of the primordial stages of human development, or as a projection from the mystic, ethereal regions of the millennial perfection yet to be, a camp-follower or a vanguard of progress, he is not in harmony with present notions of conditions and responsibilities, which is the basis of all law, and if he fails to respond to present requirements, he must suffer the consequences.

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[20] Oklahoma City *v.* Baldwin, — Okla. — (Apr. 3, 1928).
[21] Stehr *v.* State, 92 Neb., 755; 45 L. R. A., 559.
[22] 10 ALR, 1129.

"I entirely agree . . . that while the merits or demerits of the Christian Science or faith are things with which we have nothing to do as long as it does not transgress or lead to a transgression of the law, the law of the land, is paramount, and it is not for people to set themselves up in opposition to it; that the law of the land must be obeyed, and it must be obeyed even though there be something in the shape of belief in the conscience of the person which would lead them to obey what, in his state of mind, he may consider a higher power or higher authority. And especially must there be obedience where, as in this instance, the subject of the judgment to be exercised is a child of tender years, unable to exercise any judgment of his own. In one form or another it has been frequently said by able judges, and it cannot be too widely known or too often repeated, that where an offense consists of a positive act, which is knowingly done, the offender cannot escape punishment because he holds a belief which impels him to think that the law which he has broken ought not to exist or ought never to have been made."[23]

Religious Belief.—Where a statute provides that "every parent of any child who willfully omits, without lawful excuse . . . to furnish necessary . . . medical attendance for such child is guilty of a misdemeanor," a father who fails to call a physician and who refuses to permit a minor child to be treated by a physician for typhoid fever because of his religious scruples against such ministrations is liable to the penalty the law inflicts.[24] His religious conviction is not a lawful excuse. "A party's religious belief cannot be accepted as a justification for his commission of an overt act, made criminal by the law of the land.[25]

Feigned Diseases.—Diseases are often feigned so successfully as to baffle the most skilled medical experts. This subject usually comes before the courts in attempts to magnify the results of injuries, in actions for damages, and to appear insane when charged with crime. The falsity of pretended results is often extremely difficult to demonstrate, and the mere opinion of the medical *expert* is usually outweighed by the apparently truthful *assertion* of the *malingerer.* Two medical questions are involved,—

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[23] Rex *v.* Lewis, 6 Ont. L. Rep., 132; 1 B. R. C., 732.

[24] Owens *v.* State, 6 Okl. Crim., 110; 27 A. C., 1218, 1221.

[25] Reynolds *v.* U. S., 98 U. S., 145 involving polygamous marriages.

(a) Is the party in fact suffering from the condition claimed, and

(b) Could the pretended condition result from the injuries claimed to have been received?

In cases of fraud, real or apparent, the attention of the medical man should be directed to the solution of these two questions. Besides, where the relation of cause and effect are not apparent, the physician should always be on the alert for other causes of the trouble. As to pretended insanity, common observation and experience testify that the affliction can be readily and skillfully simulated.[26]

That insane persons should attempt to conceal their malady in certain stages, and even pretend to be rational, is to be expected, but the courts record but few cases where there was a well laid plan followed with any degree of intelligence by an insane person to simulate sanity.[27] Guiteau pretended to be sane notwithstanding the plea of his attorney, but his conduct at the trial cannot be regarded as an attempt to conceal insanity and to appear sane.

Possibilities.—Many diseases and groups of symptoms may be feigned. When a physician is called upon to give an opinion as to whether or not a certain alleged injury or disease is feigned, he must base his opinion upon the relation between certain facts, rather than upon a positive knowledge that the conditions claimed are feigned. His decision must depend upon the relation between the character of the injury and the conditions claimed to result therefrom; that is,

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[26] De Jarnette *v.* Com., 75 Va., 867; State *v.* Klinger, 43 Mo., 127; *Ex parte* Schneider, 21 D. C., 433.

[27] Reg. *v.* Pearce, 9 C. & P., 667.

(1) Whether or not the conditions claimed might reasonably result from the accident as described;

(2) What is the relation between the conditions claimed and those which are found upon examination;

(3) The relation between the alleged subjective symptoms and the injury or condition claimed, and could the former have been the result of the latter;

(4) Whether the subjective symptoms and conditions claimed are regular, well-defined, localized and characteristic;

(5) Are the subjective symptoms consistent with the objective symptoms?

Contracts in Restraint of Professional Practice are Not Favored in Law.—Contracts in restraint of trade, industry, employment, or personal or professional activity are not favored in law because they are considered as being against public policy. The law will not permit any one to restrain a person from doing what the public welfare and his own interest require that he should do.[28]

Prevalence.—Probably the reports of every state in the Union contain adjudicated cases in which some physician sold the good will of his practice for a consideration, and ancillary thereto agreed not to engage in the practice of his profession within a certain distance of his former location, within a certain period of time.

Validity.—Where the restraint is partial and reasonable, in good faith, and founded upon valuable consideration, such contracts are valid and enforcible.[29]

Ancillary to Employment.—Agreements not to engage in the practice of the profession in a certain place for a definite period of time, are frequently ancillary to contracts of employment of the covenantor by the covenantee and, unless void for the want of consideration or mutuality, or for unreasonableness or fraud, will be enforced by the courts, by enjoining the party from practicing in violation of his covenant.[30]

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[28] Homer *v.* Ashford, 3 Bing., 322.

[29] Hedge *v.* Lowe, 47 Ia., 137; Boutelle *v.* Smith, 67 Ill., 75; Arnold *v.* Krutzer, 87 Ia., 214; Dwight *v.* Hamilton, 113 Mass., 175; Cook *v.* Johnson, 47 Conn., 175; Niles *v.* Fenn, 33 N. Y. Supp., 857; Horner *v.* Graves, 7 Bing., 735; Butler *v.* Burleson, 16 Vt., 176.

Specific Performance.—Courts of equity will enforce specific performance of such negative agreements by restraining a breach thereof by injunction, prohibiting the covenantor from practicing in violation of his contract.

Reason for the Relief.—The injunctional relief is based upon the theory that the covenantee does not have a complete and adequate remedy at law, since the latter action is for damages only and in which he can recover only what he can prove. The evidence to establish damages might not be available, and, ordinarily, would be purely speculative.[31]

Contract in Writing.—By all means such contracts should be in writing and the restriction should not be greater than absolutely necessary reasonably to protect the vendee and to insure him that he will get what he contracted for.

PROVISIONS OF CONTRACT.—(a) *Time Limit.*—It is advisable to incorporate a limitation as to time. While such limitation is not indispensable, it may become important if the limitation as to space might otherwise appear unreasonable.[32]

(b) *Assignees, etc.*—It is advisable to require the vendor to agree not to engage in the practice in the vicinity, nor enter the employ of any one there engaged in the practice, and the promise should run to the vendee and his assigns, so that the covenant may be enforced after the death of the covenantee, if desired.

COURTS WILL NOT REFORM CONTRACT.—The court will not attempt to make a new contract for the parties by fixing a reasonable limit within which it will enforce the covenant, though such reasonable limitations can readily be determined. The court will enforce or annul the contract made, but will not undertake to make a new contract for the parties.[33]

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[30] Freudenthal *v.* Espey, 45 Colo., 488; 26 L. R. A., 961.

[31] Hubbard *v.* Miller, 27 Mich., 15; Doty *v.* Martin, 32 Mich., 462; Parkinson's Appeal, 78 Pa. St., 196; Ellis *v.* Jones, 56 Ga., 504.

[32] Ocean Steamer Navigation Co. *v.* Winsor, 20 Wall., 64; Boyce *v.* Watson, 52 Ill. App., 361; Feckelstein Bros. Co. *v.* Feckelstein, 76 N. J. L., 613; *See* L. R. A., 913, 927.

WHEN REASONABLE SUCH CONTRACTS WILL BE ENFORCED ACCORDING TO THEIR SPIRIT.—In order to be entitled to relief it is not necessary that the covenantee prove that the consideration was *adequate,* or that the covenantor is *insolvent,* or that the damage will be *irreparable.*[34]

Illustrations.—Where a physician, for a consideration, agreed not to practice medicine in the village *or vicinity* for at least the term of five years, on attempting to violate the covenant he was restrained from practicing within ten miles of the village limits.[35] An agreement by a physician with the purchaser of his residence and practice in a country town, not to engage in the practice of medicine *within six miles of his said residence,* was considered reasonable.[36] Such agreements by physicians, when for a consideration, have been held binding when limited to *twelve miles,*[37] *fifteen miles,*[38] and *twenty miles* [39] of the then residence of the promisor.

Injunctions.—While courts of equity will restrain parties from affirmative acts in violation of their negative covenants, usually they will not enter mandatory injunctions which will require performance of acts on the part of the covenantor.[40] Thus, where a *prima donna* agreed to sing at a certain theatre and promised not to engage with a rival house, the courts would not require her to appear as promised, but they did restrain her from warbling at a rival theatre in violation of her covenant. The reason for refusing the affirmative relief is because courts will not enter decrees where they cannot enforce substantial compliance therewith.[41]

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[33] Horner *v.* Graves, 7 Bing., 734.

[34] Ryan *v.* Hamilton, 205 Ill., 191; Gordon *v.* Mansfield, 84 Mo. App., 367; Beatty *v.* Goble, 142 Ind., 329; McCurry *v.* Gibson, 108 Ala., 451; 32 C. J. 216 *et seq.*

[35] Timmerman *v.* Dever, 52 Mich., 34.

[36] Linn *v.* Sigsbee, 67 Ill., 75.

[37] McClurg's Appeal, 58 Pa. St., 51.

[38] Miller *v.* Elliott, 1 Ind., 484.

[39] Butler *v.* Burleson, 16 Vt., 176.

[40] Wollensak *v.* Briggs, 20 Ill. App., 50; Blanchard *v.* R. R. Co., 31 Mich. 43.

Asexualization and Sterilization.—Asexualization by vasectomy or sterilization by salpingectomy, as a penalty for crime whereof the party has been duly convicted, is not prohibited by the constitutional provision against the infliction of cruel and unusual punishment. To come within the constitutional inhibition the punishment must be both cruel and unusual.[42] "Cruel and unusual punishments are punishments of a barbarous character unknown to the common law. The word, when it first found place in the Bill of Rights, meant not a fine or imprisonment, or both, but such punishment as that inflicted by the whipping-post, the pillory, burning at the stake, breaking on the wheel and the like, or quartering the culprit, cutting off his nose, ears or limbs, or strangling him to death."[43] The practice of flogging for certain offenses has been upheld on the ground that, while cruel, it was not unusual at the time of the adoption of the constitution and was not unknown to the common law. Asexualization by vasectomy as a penalty for the crime of rape was sustained because, while unusual, it was not cruel. The evidence in the case showed that the operation is a minor one, easily performed, without pain to the patient and entailing no confinement to bed or even cessation from employment.[44]

The rulings of the court in matters pertaining to this subject is an example of the progress of administrative law with the progress of scientific thought on the subject involved. We are gradually drifting from the individualistic idea of government and its purposes. The individual may still be the unit of might and of right, but the courts are more and more inclined to the doctrine that the community is the supreme consideration and must be protected even against the apparent interests of the individual when the necessity is manifest and the course of action reasonably certain. The courts are beginning to refuse to permit constitutional guarantees of individual rights to be so interpreted as to perpetrate a clear and positive injustice to society. The part must be subordinated to the whole. There are about twenty states in which, under certain conditions and restrictions, sterilization is provided for by statute.

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[41] Lumley *v.* Wagner, 1 DeG., M. & G., 604; Webster *v.* Dillon, 3 Jur. N. S., 432; M. E. Co. *v.* Ward, 9 N. Y. Supp., 779; 32 C. J. 200 *et seq.*

[42] State *v.* Woodward, 68 W. Va., 66; 30 L. R. A., 1004.

[43] *In re* O'Shea, 11 Cal. App., 575.

[44] State *v.* Feilen, 70 Wash., 65; 41 L. R. A., 418.

To Prevent Procreation.—When applied to defectives, who have committed no offense, for the sole purpose of destroying their power of procreation, a different consideration arises and the conservatism of the law may be depended upon to prevent any radical measures in this direction. All citizens are entitled to the equal protection of the law, and no rights may be impaired except by procedure according to the law of the land. If such operation is permitted, the sanction will come under the guise of that most flexible doctrine, the police power. The right of a state to sterilize by salpingectomy an epileptic, has just been denied by the Supreme Court of New Jersey.[45] The court calls attention to the fact that the operation of salpingectomy is a dangerous one, requiring both sides to be operated upon under profound and prolonged anesthesia and considered that it involved all the dangers to life incident to the anesthetic and to a serious surgical operation. The court said: "The order with which we have to deal threatens possibly the life and certainly the liberty of the prosecutrix, in a manner forbidden by both the State and Federal Constitutions, unless such order is a valid exercise of the police power. The question thus presented is, therefore, not one of those constitutional questions that are primarily addressed to the legislature, but purely a legal question as to the due exercise of the police power. This power is the exercise by the legislature of a state of its inherent sovereignty to enact and enforce whatever regulations are, in its judgment, for the welfare of society at large, in order to secure or to guard its order, safety, health or morals. The general limitation of such power, to which the prosecutrix must appeal, is, that under our system of government, the artificial enhancement of the public welfare by the forcible suppression of the constitutional rights of the individual is inadmissible. Somewhere between these two fundamental provisions the exercise of the police power in the present case must fall, and its assignment to the former rather than to the latter involves consequences of the greatest magnitude. For, while the case in hand raises the very important and novel question, whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws, it is evident that the decision of that question carries with it certain legal consequences having far reaching results. The feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would or might in the judgment of the legislature be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open, to which it would be difficult to assign a legal limit.''

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[45] Smith *v.* Board, 85 N. J. L., 46; 88 Atl., 963; Davis *v.* Berry, 216 Fed., 413; *Re* Thompson, 169 N. Y. Supp., 638.

The court held that the classification of those subject to the operation was of such a nature that the persons included within it are not afforded the equal protection of the laws, and announced the doctrine that the state statute which bears solely upon a class of persons, selected bv it, must not only bear alike upon all the individuals of such class, but that the class as a whole must bear some reasonable relation to the legislation in question. The court does not, however, pretend to hold that the state does not have the right, under its police power, to order surgical operations upon its citizens whereby they shall be rendered incapable of procreation, if there is a proper basis for the classification adopted.[46]

Summary.—A state may provide (1) for the sterilization of a feeble-minded inmate of a state institution, (2) who is the daughter of a feeble-minded mother, and (3) the mother of an illegitimate, feeble-minded child, (4) where it is found that she is the probable, potential parent of socially inadequate offspring likewise afflicted, (5) provided that she can be sterilized without danger of detriment to her general health, and (6) that her welfare and that of society will be promoted by such procedure.[47]

A statute providing for sterilization of defectives does not violate the equal protection clause of the Federal Constitution by reason of the fact that its operation is limited to inmates of state institutions. *Id.*

In deciding this case Justice Holmes said: "It is better for all the world if, instead of waiting to execute degenerate offspring for crime, or letting them starve for their imbecility, we can prevent those who are manifestly unfit from continuing their kind. . . . We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who have already sapped the strength of the state, for these lesser sacrifices, often felt not to be such by those concerned, in order to prevent our being swamped with incompetents."

Vaccination.—*The right to require vaccination is based upon the police power.*

POLICE POWER.—The police power of a State may be exercised by the legislature wherever the application thereof will reasonably promote the public health, safety or welfare, subject only to constitutional limitations, and if the latter are not transgressed the courts will not interfere to prevent enforcement of the legislative will.[48] The police power is that inherent and plenary power in the State over persons and property, when expressed in the legislative will, which enables the people to prohibit all things inimical to the comfort, safety, health and welfare of society, and is sometimes spoken of as "the law of overruling necessity."[49] On this subject the Federal Supreme Court said that the police power extends to all the great public needs and that it may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

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[46] R. Co. *v.* Ellis, 165 U. S., 150.

[47] Buck *v.* Bell, 274 U. S. 200, 207.

Statutory Provisions for Vaccination.—Compulsory vaccination has not been enforced in the United States. A requirement for vaccination is upheld as a valid exercise of the police power by the legislature but our laws do not go to the extent of requiring the authorities forcibly to perform the operation on the recalcitrant citizen but merely provide a penalty for failure to comply with such requirements. In some jurisdictions boards of health have authority conferred upon them by the legislature to order under penalty the vaccination of all citizens wherever it may be deemed necessary to public health and safety and the general welfare.[50] The presence or reasonable apprehension of smallpox in the community is a sufficient necessity, under such law, for promulgating the requirement.[51]

Enforcement of Statutes.—While a law may not confer arbitrary power on administrative officers in respect to the police power, it may invest them with broad discretion for the protection and maintenance of public health.[52] States may provide for compulsory vaccination and leave the detail of the enforcement of the law to administrative officers.[53]

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[48] Viemeister *v.* White, 179 N. Y., 235.

[49] Town *v.* Cemetery Co., 70 Ill., 191, 194.

[50] Com. *v.* Jacobson, 183 Mass., 242; 197 U. S., 11; L. R. A., 709.

[51] Potts *v.* Breen, 167 Ill., 67.

[52] Zucht *v.* King, 260 U. S., 262.

A law required vaccination of all children attending public schools, and permitted the exclusion of those who were not vaccinated. Another law penalized a parent for refusing or neglecting to send his children of school age to school. A parent refused to have his children vaccinated, and they were excluded from school in accordance with the provision of the law. He was thereupon prosecuted for refusing and neglecting to send them to school, and the penalty inflicted was sustained by the Supreme Court of the state, and the Federal Court refused to interfere.[54]

Vaccination a Preventative.—The courts do not base their conclusions on a finding of fact that vaccination is a preventative of smallpox but they take judicial notice of the fact that it is the common belief of the people that vaccination is a preventative.[55]

Opposing Theories.—The courts will take judicial notice of the fact that there are opposing theories with regard to the propriety and effect of vaccination, and they presume that the legislature when enacting such a law knew of the theory against vaccination and deliberately adopted the opposite theory, and the courts will not revise their discretion in that respect.[56]

Public Schools.—The exclusion of a child from a public school by a local board by reason of a refusal to be vaccinated is justified when such extremity is necessary or reasonably appears to be necessary, to prevent the spread of smallpox, because of an existing or actually threatened epidemic of the disease in the locality and, conversely, a rule adopted by a State Board of Health compelling vaccination of all children as a prerequisite to their right to attend public schools is unreasonable when smallpox does not exist in the community and when there is no reasonable cause to apprehend its appearance.[57] In the case last cited the decision of the court was based upon the fact that the legislature had not clothed the board with any authority to promulgate such an order. Doubtless the legislature may provide for vaccination as a condition precedent to the right to attend public schools irrespective of the presence or threatened appearance of smallpox in the vicinity or state,[58] and some courts have held that the legislature may delegate such power to local boards.[59]

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[53] Jacobson *v.* Mass., 197 U. S., 11.
[54] Gillin *v.* Board of Public Education of Philadelphia, 250 Fed., 649.
[55] Viemeister *v.* White, 179 N. Y., 235; 1 A. C., 334.
[56] Com. *v.* Jacobson, 183 Mass., 242.

A school superintendent is not personally liable for excluding children from school on order from the commissioner of health.[60]

The enforcement of such requirement has frequently been restrained by the courts and the orders annulled because of the want of authority in the particular board promulgating the requirement.[61]

Some courts have taken the position that a general grant of power, in broad and comprehensive terms, to do the acts and make all rules and regulations necessary for the preservation of the public health, carries with it, by necessary implication, the power to enforce in cases in which the necessity arises a regulation requiring children to be vaccinated as a condition to their admission or continued use of the public school.[62]

Employing Health Officers.—As a general rule, school boards have authority to employ surgeons, dentists and nurses to determine the health and physical condition of pupils in attendance and to advise as to the requirements and methods of physical development and education, but it has been held that, at the expense of the taxpayers, they can not equip and maintain rooms in school buildings and employ surgeons, dentists and nurses for the performance of surgical and dental operations upon children who are unable to pay for such services. The answer to questions of this character usually hinges on the provisions of the statutes involved, but the courts have shown a tendency towards liberality of interpretation in order to sustain the administrative board.

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[57] Potts *v.* Breen, 167 Ill., 67. *See* 177 Ill., 572, 234 Ill., 422; 302 Ill., 422.
[58] Lawton *v.* Steele, 152 U. S., 136; Morris *v.* Columbus, 102 Ga., 792.
[59] Bissell *v.* Davidson, 65 Conn., 183.
[60] Hagler *v.* Larner, 284 Ill., 547.
[61] People *v.* Board, 234 Ill., 422.
[62] Blue *v.* Beach, 155 Ind., 121.

Charitable Institutions.—Where due care is used in the selection of its employees, a private charitable hospital, conducted for benevolent and philanthropic purposes, is not responsible to a patient for damage received through the unskillfulness or carelessness of servants, attendants or physicians in charge, even though the patient paid for the services given.[63] The same rule applies to a school of instruction supported by charity, and where all fees for tuition and other income must be used for the benefit of the institution, and where no part of the same can be distributed to any one as profit.[64] A city, county or state does not possess power to operate a hospital for revenue and, therefore, cannot be made liable for the negligence of persons employed about the hospital, even though the authorities are unlawfully conducting the institution for revenue.[65] *Where the hospital is a private institution and conducted for profit, the institution is liable for such negligence.*[66] Provisions of charter may control.

Basis of Liability.—Where a liability is enforced, it is based upon the doctrine of *respondeat superior,*—let the principal beware. This doctrine is founded upon the principle that he, who expects to derive advantage from an act which is done by another in his behalf, must answer for any injury which a third person may sustain by reason of the negligence of the agent in the premises. The maxim was first applied to public officers by the Statute of Westminster II, Chapter 2, from the words of which statute the expression is taken.[67]

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[63] Benton *v.* City Hospital, 140 Mass., 13; Duncan *v.* Neb. S. & B. Asso., 92 Neb., 162; Olander *v.* Johnson, 258 Ill. App., 89.

[64] Parks *v.* N. W. University, 218 Ill., 381; 4 A. C., 103; Farrigan *v.* Pevear, 193 Mass., 147; 7 L. R. A., 48.

[65] Tollefson *v.* Ottawa, 228 Ill., 134; 4 L. R. A., 269.

[66] Stanley *v.* Schumpert, 117 La., 255; 8 S. A. C., 1044; Wetzel *v.* Omaha Hosp. Assn. (Neb.), 148 N. W., 582.

Some courts hold institutions liable in an action *ex contractu* on a showing that the institution breached the contract, but they have not given the measure of damages in such cases.[68]

A private hospital is liable in damages to a patient who, while unconscious, was severely burned in the back by hot water bottles placed there by one of its nurses without direction from the attending physician.[69]

A charitable hospital was held liable to a physician who took a patient to the hospital and was injured by coming in contact with high-voltage wires through the carelessness of the hospital.[70]

A hospital, though public in character, is liable to strangers, i. e., to persons other than patients, for the torts of its employees within the line of their employment.[71]

Inmates of Public Hospitals.—Neither the state which operates an insane asylum, nor the superintendent who has control over the same is liable to a party who is injured by an inmate.[72]

Right of Physician to Practice in Hospital.—It cannot be said as a matter of law that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision thereof, especially where the use thereof is reserved for purposes of medical instruction in some particular school or schools of medicine. In the management of a hospital some choice in methods of treatment is inevitable, and a classification having some basis in the exercise of the judgment of a State Board, whose action is challenged, is not a denial of the equal protection of the laws. The fact that osteopathic physicians are excluded from a public hospital where other systems are used does not violate the Constitution.[73]

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[67] Hall *v.* Smith, 2 Bing. 156, 160.

[68] Ward *v.* St. Vincent Hospital, 57 N. Y. Supp. 784; Armstrong *v.* Wesley Hospital, 170 Ill. App. 81.

[69] Tucker Sanatorium *v.* Cohen, 129 Va., 576; 22 ALR, 315, and note.

[70] Marble *v.* Nicholas Senn Hospital Association, 102 Neb. 343.

[71] Schloendorf *v.* N. Y. Hospital, 211 N. Y., 125, 129; Murtha *v.* N. Y. Homeopathic Hospital, in N. Y., Court of Appeals, February 24, 1920.

[72] Leavell *v.* W. Ky. A. I., 122 Ky., 213; Clough *v.* Worsham, 32 Tex. Civ. App., 187.

Exclusion of Physician from Hospital.—Public hospitals may exclude a licensed physician for good cause. Soliciting practice from other physicians and offering to divide with them his fees in surgical cases is not sufficient cause for such exclusion. Probably a private hospital may exclude a physician without cause, from mere caprice or otherwise.[74]

Jury Service.—The exemption, by statute, of physicians from jury duty is very general in the United States, and such laws are usually held to be constitutional;[75] but a different view has been taken in Tennessee, and such a statute was held to be class legislation.[76]

Where such exemption is allowed, the courts construe it to be a personal privilege which must be claimed by the physician and which may be waived by him. Such privilege furnishes the parties to the litigation no ground for challenge of him as a juror, nor for objection to the verdict in which he participates.[77]

Libel and Slander.—The utterance of written or printed words which impute to a physician ignorance, incompetence or a general want of professional knowledge and skill is an actionable wrong, without proof of special damages. The language must refer to the physician in his professional capacity.[78] However, a person who is practicing osteopathy without a license cannot recover as for a libel for being called a quack and charlatan.[79]

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[73] Hayman *v.* Galveston, — U. S. —, Feb. 21, 1927; Olander *v.* Johnson, 258 Ill. App., 89.

[74] Henderson *v.* Knoxville (Tenn.), 60 ALR 652.

[75] Dunne *v.* People, 94 Ill., 120.

[76] Neeley *v.* State, 4 Lea. (Tenn.), 316.

[77] People *v.* Owens, 123 Cal., 482.

[78] Nelson *v.* Borchenius, 52 Ill., 236; 20 A. C., 482.

[79] Lathrop *v.* Sundberg, 62 Wash., 136.

Gifts and Legacies.—The relation of a physician to his patient is one of trust and confidence and the former occupies the dominant position. The general principles of law governing confidential relations apply. Courts will scrutinize with great care any transaction between a physician and his patient, favorable to the physician. The law regards the patient as being in a subordinate position easily susceptible to the wishes of the physician. The relation does not *per se* forbid the acceptance by a physician of a gift or conveyance from his patient, but the burden is on the donee to prove that such gratuity was fairly and honestly obtained without any undue influence and that the entire transaction was free from all fraud and above suspicion. The same rule applies where a patient makes a will in favor of the physician, and especially when made in the presence of the latter.[80]

Narcotic Drugs—Intoxicating Liquors.—Laws relating to the distribution of narcotic drugs and intoxicating liquors, being remedial in character, are liberally construed by the courts with a view to effectuate their general purposes. Recognizing the fact that these prohibited articles may have certain limited, useful and beneficial functions and qualities in therapeutic administration, the law usually makes exceptions permitting their use and prescription in good faith by regularly licensed physicians in the course of their treatment of their patients where such administration is, in fact, therapeutically indicated. A discretion lodged in a physician must be exercised with great care and in absolute honesty of purpose and judgment. No physician can afford to experiment in these matters. Better err on the side of strict interpretation of the law and be safe, than to take chances and be the disgraced object of a criminal indictment. The good faith of the physician who takes advantage of the right conferred by these exceptions is always open to question, and any abuse of the discretion lodged in him may subject him to judicial inquiry and criminal prosecution. His conduct must not be a mere evasion of law, however well planned or systematically executed. The courts ruthlessly tear the mask from artifice, pretense, deception and fraud. You can not do indirectly what you can not do directly. The courts have uniformly announced the principle that the question of whether the physician exercised his honest, professional judgment and acted in good faith, or whether he intentionally violated the statute, is a question of fact for the jury, to be determined by them as men of practical sense and sound judgment from all the circumstances in the case. For the courts to take any other position would mean the defeat of the purposes of the law. His license and high professional standing do not establish his good faith, nor shield him from prosecution. He can not protect himself by pretending to act in a professional capacity while, in fact, attempting to run a narcotic drug store or a drinking saloon.

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[80] Unruh *v.* Lukens, 166 Pa. St., 324; Audenreid's Appeal, 89 Pa. St., 114.

Where a statute prohibited dispensing and prescribing certain narcotic drugs to persons who had acquired the habit of their use, "except when the drug is obviously needed for therapeutic purposes," and providing that the treatment shall be in good faith and not for the purpose of evading the law, the judgment of the physician that the drug is so required is not final and conclusive, and his good faith was regarded as a question of fact for the jury, to be determined from all the circumstances in the case.[81]

In order to prevent imposition, some statutes limit the right of physicians to dispense the prohibited articles to their use in the course of professional treatment only, and then under the personal supervision and attention of the physician.

Where the therapeutic value of the restricted article is well established and undisputed, the physician, acting in good faith, may, according to some decisions, lawfully prescribe it in a case in which it is clearly indicated, even though the statute or ordinance does not specifically except such administration.[82]

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[81] Com., *v.* Noble, 83 Mass., 230; L. R. A., 1918 E., 667.

Every provision of the law justifying the act of the physician must be strictly complied with. If the law requires a record of the prescriptions to be kept by the physician, literal compliance therewith is necessary to protect the practitioner from prosecution.[83]

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[82] State *v.* Hesse (1916), 195 Mo. App., 616; L. R. A., 1918 E., 670.
[83] State *v.* Jones, 18 Ore., 256.

INDEX

INDEX

A

Abandoning patient, 178
Abdominal organs in infanticide, 258
Abortion, 193
  advice of physician, 195, 199
  attempt to procure, 194
  burden of proof, 196, 199
  circumstantial evidence, 197
  civil liability, 200
  common law, 193
  consent of woman, 193, 195, 200
  criminal, 193
  dead fœtus, 196
  definition, 193
  dying declaration, 42
  evidence of pregnancy, 197
  existence of pregnancy, 196
  fact of pregnancy, 196
  failure to produce, 195
  intent, 194
  knowledge of pregnancy, 195
  means employed, 195
  motive, 194
  necessary, 198, 199, 200
  opinion evidence, 197
  period of pregnancy, 196
  pregnancy, 195, 196
  proof of pregnancy, 196
  quick with child, 193
  res gestæ, 197
  save life of mother, 198
  soliciting, 51
  stage of pregnancy, 196
  statutes, 198
  to procure, 194
  without woman's consent, 195
Absorbent gauze cases, 130
Accident, 160
  death by, 20
  definition, 160
  liability, 160
  negligence, 160
Accrual of cause, 262
Acquiescing in improper treatment, 164
Act, independent, 189
  prohibited, 119
Action:
  form of, 187
  joint, 189
  release, 191
  survival of, 191
Acts, civil rights, 169
Administering anesthetic, 216
Administrative law, 23
Adverse statements, 52
Advertisements, false, 74, 208
Advice, must follow, 154
Affirmations, 33
Age of consent, 250
Aggravation of injury, 184, 186
Agreement, 81, 109, 150, 190
  for operation, 109
    agent, surgeon, 118
    consent, 110
    controlling facts, 115
    damages, for unauthorized operation, 123
    departure, 111
    different methods, 116
    discretion of surgeon, 113
    elements, 109
    emergency, 112, 115
    good faith, 117
    husband and wife, 111
    illustrations, 119
    implied consent, 107
    implied stipulations, 109
    motive, 110
    nature, 109
    parent and child, 111
    patient controls, 116
    patient's request, 117
    presumptions, 114
    prohibited act, 119
    question of fact, 118
    stipulations, 109
    surgeon's discretion, 113
    unconscious patient, 90, 112, 115
    whose consent, 111
  for special skill, 150

Agreement—*continued*
  not to practice, 277
  not to sue, 190
  to take case 178
Aiding unlicensed physician to violate law, 76
Ailment as affecting skill, 142
Anesthetics, 215
  administering, 216
  cold, 215
  death from, 219
  definition, 215
  duty, 218
  effects, 215
  general, 215
  kinds, 215
  legal responsibility, 218
  local, 215
  malpractice, 218
  presumptions, 219
  rape, 251
  refusal to give, 170
  responsibility, 218
  right to administer, 216
  selection, 217
  testimony, 219
Arbitrary refusal to take case, 167
Asexualization, 280
Assignee of contract, 278
Assumption of risk, 150
Attempt to procure abortion, 194
Autopsy, 49, 107, 253, 271
  disclosing information, 49
  fee for holding, 107
  poisoning cases, 253
  unauthorized, 123
Average skill, 141
Avocations, other, 166

B

Bad character of physician, 99
Bankrupts, 22
Beliefs, medical care, 275
  penalizing, 21
Best judgment, 145
Biological tests for blood, 247
Blood, 243
  accuracy of tests, 246
  biological tests, 247
  chemical tests, 246
  classification, 243
  coagulation, 245

Blood—*continued*
  color, 243, 247
  composition, 243
  corpuscles, 243
  criminal law, 247
  definition, 243
  demonstrative evidence, 249
  hematin, 245
  hemoglobin, 245
  origin, 243
  oxy-hemoglobin, 245
  physical tests, 246
  plasma, 244
  platelets, 244
  quantity, 243
  red corpuscles, 243
  specific gravity, 243
  stains, 243
    color, 247
    criminal law, 247
    testimony, 248
  tests, 246
  weight, 243
  white corpuscles, 244
Boards of health, 272
Books, medical, as evidence, 60
Breach of contract, 94
Breathing, infanticide, 257
Burden of proof:
    abortion, 197, 199
    contributory negligence, 161, 175
    infanticide, 255
    insanity, 226
    malpractice, 153, 167, 170, 174
Business on Sunday, 268 et seq.

C

Calcareous degeneration of the heart, 129
Call, response to, 178
Calls, frequency of, 97
Care, 138, 143
  agreement waiving, 150
  assumption of risk, 150
  burden of proof, 152, 170, 174
  carelessness, 145
  definition, 143
  degree, 144
  established mode, 152
  experimentation, 145, 152
  failure to cure, 148
  gratuitous services, 152

Care—*continued*
  highest, 144
  implied, 137
  misconduct, 145
  non-professional, 153
  ordinary, 144
  presumption, 148
  relative term, 144
  results, 148
  special agreement, 150
  specialists, 151
  tests, 144
  unlicensed practitioner, 157
  usual, 143
  volunteer, 153
Carelessness never excused, 145
Case, refusal to take, 167
Cases on fraud, 209
Cause and effect, 125
Causes of death, infanticide, 259
Caveat emptor, 204
Certainty of proof, 212
Character, license, 65, 99
  of physician, 65
Charge for services (*see* Compensation), 92
Charges to revoke license, 77
Charitable institutions, 287
Chastity in rape cases, 251
Choice, 221
Christian Science, 69, 176, 274
Circulatory organs, infanticide, 258
City, liability of, 273
  license, 68
Civil law, 22
  malpractice, 158, 200
  rights acts, 169
Coagulation, 245
Code of Hammurabi, 92
Cold as anesthetic, 215
Color of blood, 243, 247
Communication of infectious diseases, 98
Communications, privileged, 46
Compensation, 92
  agency of minor, 104
  agreement, 90, 93
    to cure, 96
  autopsy, 107
  bad character, 99
  benefit to patient, 93
  bill, differing, etc., 98

Compensation—*continued*
  character, 99
  charge by other physicians, 99
    for previous services, 98
    to other patients, 99
  consultant, 105
  defenses, 104
  detriment to physician, 94
  different bill, 98
  emergency, 90
  expert witness, 105, 106
  extra for extra services, 107
  family expenses, 103
  financial standing, 99
  frequency of visits, 97
  history, 92
  husband and wife, 102
    selects physician, 102
  income of patient, 99
    of physician, 99
  infectious disease, 98
  judgment for fee, effect, 180
  license presumed, 100
  limitations, 262
  malpractice, 104
  mother liable, 104
  nature of remedies disclosed, 101
  necessaries, 102
  no agreement, 93
  opinions, 101
  parent and child, 102, 103
  pecuniary circumstances, 99
  post-mortem, 107
  previous charges, 98
  professional standing, 98
  proof, 101
  proper treatment, 94
  ratification, 104
  remedies disclosed, 101
  results as effecting, 94, 96
  services during life of patient, 96
  special agreement, 96
    preparation, 107
  treatment, proper, 94
  unconscious patient, 90
  unlicensed practitioner, 100
  value, 97
    question of fact, 97
  visits, frequency, 97
  what shown, 98
  what not shown, 99
  witness fees, 105

Competency of evidence, 33
Competent and incompetent, 61
  to practice, 65
Conditions of the relation imposed by law, 135 et seq.
Confidence, 205
  and public duty, 154
Confidential relation, 205
Confucius' ethics, 137
Consent, age of, 250
  to abortion, 195, 200
  to operation, 109, 110, 111
    implied, 110
    necessary, 109
    whose, 111
Consideration, contract, 85
Constitutional guarantees, 31
  provisions, 31, 73
Constructive discovery, 266
Consultant, 105
Contagious disease, carrying, 98
Continuing wrong, 266
Contracts, 81
  agreement for surgical operation, 109
  assignee, 278
  benefit to promisor, 86
  breach, 94
  compensation, 92, 94
  consideration, 85
  constitutional right, 87
  definition, 82
  delivery, 83
  detriment to promisee, 86
  duty, compared, 81
  equivalence, 85
  express, 82
  guaranty, 87
  implied, 82
  infants, 84
  injunctions, 279
  kinds, 82
  minors, 84
  mutuality, 84
  non compi menti, 84
  not to sue, 190
  nudum pactum, 86
  operation, 109
  parties, 84
  promise for promise, 86, 87
  ratification, 104
  receipt, 88
Contracts—*continued*
  release, 89
  restraint of practice, 277
  right to contract, 87
  signing written contract, 86
  specific performance, 278
  Sunday, 268
  surgical operation, 109
  validity, 86
  written, 83
Contractual relations, 81
Contribution, 190
Contributory negligence, 161
    assistant, 164
    burden of proof, 152, 161, 170, 174, 260
    definition, 161
    effect, 161
    inevitable results, 162
    obey instructions, 163
    patient's negligence, 161
    reason for rule, 162
    relation, 161
    temperament, 163
Coroners, 271
  autopsy, 271
  civil liability, 271
  definition, 271
  duties, 271
  slander, 271
Corpuscles, 243
Corporations cannot practice medicine, 67
Courts, 27
  and physician, 25
Crime, 19
Crimes with medical aspects, 250
Criminal action and civil suit, 23
  law, 19
    insanity defense, 226
Criminal malpractice, 192
Cross-examination of expert, 59
Cruel punishments, 21, 280
Cure:
  failure to, 94, 170
  no cure, no pay, 96

D

Damages, 181
  action for, 181
  aggravation, 186
  amount recoverable, 183

Damages—*continued*
  assessment, 183
  compensatory, 182
  contingencies, 185
  contribution, 190
  contract, 188
  death, 188
  elements, 183
  excessive, 186
  exemplary, 182, 184
  false pretenses, 213
  form of action, 187
  future loss, 183
  insane persons, 238
  measure, 183
  mistakes of physician, 184
  mitigation, 186
  nominal, 187
  operation, wrong, 117
  original injury, 186
  patient's poor health, 186
  presumptions, 183
  punitive, 182
  reduce by surgical aid, 184
  satisfaction, 190
  temperament, 163
  torts by insane, 238
  unauthorized operation, 123
  vindictive, 182
Death:
  accident, 20
  anesthetic, 219
  damages, 188
  malpractice, 188
  natural causes of in infanticide, 259
  wounds, 240
Debt:
  imprisonment for, 22
Declarations:
  against interest, 51
  dying, 39
  to physician, 41
Defectives, asexualization of, 281
Defenses to malpractice suit, 180
Definitions:
  abortion, 193
  accident, 160
  care, 143
  contract, 82
  courts, 27
  crime, 19

Definition—*continued*
  dying declaration, 39
  evidence, 33
  expert, 53
  fraud, 202
  hypothetical question, 57
  infanticide, 255
  insanity, 223, 226 et seq.
  jurisdiction, 27
  law, 17, 19
  legal right, 27
  malpractice, 158
  medical jurisprudence, 26
  negligence, 159
  opinion evidence, 34
  poison, 252
  police power, 283
  presumption, 126
  privileged communication, 46
  rape, 250
  res ipsa loquitur, 125
  testimony, 33
  trial, 30
  wound, 239
Delirium tremens, 229, 235
Demonstrative evidence, 249
Dentist, 132, 164
  and physician, 164
Dentistry, physician practicing, 71
Departure from agreed operation, 117
Detriment to physician, 94
Development of medical science, 24
Diagnosis, 170 et seq.
Different methods, 147
Diligence, 263
Discovery, constructive, 266
Discretion, delegating, 70
  latitude, 146
  of surgeon, 113
Disease:
  as affecting skill, 142
  contagious, 98
  feigned, 275
Druggist, 164, 190
Drunkenness (*see* Intoxication), 166, 229, 230
Due process of law, 73
Duties:
  affirmative, 136
  negative, 136

Duty, 135
  measure of, 136, 172
Dying declarations, 39
  abortions, 41

E

Effect:
  and cause, 125
  opinion evidence, 53
  signing contract, 86
  testimony, 33, 37
Elements of damages, 183
Emergency operation, 90, 112, 115
Employment, 90
  accepting services, 90
  by third party, 90
  unconscious patient, 90
Engagements, other, 166
Epilepsy, 230, 281
Equivalence, 85
Established treatment, 152
Evidence, 33
  abortion, 197
  books, 60
  circumstantial, 197
  competency, 33
  demonstrative, 249
  hearsay, 38
  hypothetical question, 57
  infanticide, 257
  malpractice, 158, 170
  medical, 250, 257, 260
    books, 60
  opinion, 34
  rape, 250, 251
  rules, 38, 46
  weight, 37, 53
Excluding physician from hospital, 289
Exemption from jury duty, 289
Exhibiting injury to jury, 177
Expense, family, 103
Experimentation, 152
Expert testimony, weight and effect, 53
  witnesses, 53
    basis of opinion, 57
    conduct, 54
    cross-examination, 59
    definition, 53
    fees, 105, 106
    history, 54
Expert witnesses—*continued*
    hypothetical question, 57
    medical books, 60
    physicians, 54
    preliminary inquiry, 53
    qualifications, 53
    special knowledge, 54
    status, 60
    subjects of inquiry, 55
    symptoms, 58
    weight of testimony, 37, 53
Express contract, 82

F

Failure to cure, 94, 166
  to relieve, 94, 163, 166
Fair dealing, 207
False advertisements, 74, 75, 208
  representations, 202, 207
    actionable, 204
    advertisements, 75, 208
    by third party, 208
    by patient, 213
    caveat emptor, 204
    certainty of proof, 212
    confidence, 205
    corrupt motive, 203
    damages, 213
    definition, 202
    effect, 202
    elements, 212
    fair dealing, 207
    false pretenses, 207
    fraud, 202
    good faith, 206
    illustrations, 209
    improvement, 207
    intent, 202
    knowledge, 202 et seq.
    materiality, 203
    measure of damages, 183
    misstating improvement, 207
    motive, 203
    opinions, 204
    pretenses, 207
    proof, 212
    relation of parties, 206
    remedies, 213
    special knowledge, 206
    trust, 205
Family expense, 103
Fee (*see* Compensation), 92

Feigned diseases, 275
Form of action, 187
Former judgment, 180
Fraud, 202
Free services, malpractice, 152
Frequency of visits, 97

G

Gauze, surgical operation, 130, 265
Gestation, 54, 187, 195, 196
Gifts, 290
Good faith, 51, 160
Gratuitous services, 152
Guarantor, physician not, 94, 162, 166
Guaranty, 87

H

Habit-forming drugs, 290
Hammurabi Code, 92
Health, boards of, 272, 286
Hearing to revoke license, 77
Hearsay evidence, 38
Hematin, 245
Hemoglobin, 245
Homicide, 226, 238
Hospital, selection of, 166
Hospitals, 287
Husband selects physician, 102
Hydrostatic test, 258
Hymen, rupture of, in rape, 252
Hypnotism, rape, 251
Hypothetical question, 57

I

Identity of mother, 260
Ignorance, 137
Immorality, license, 65, 73
Implied conditions, 109, 137
Imposing on privacy, 154
Imprisonment for debt, 22
Improper treatment, 94, 158, 164
Improvement, misstating, 207
Independent acts, 189
  existence, 256
  services, 163
Infanticide, 255
  abdominal organs, 259
  breathing, 258
  burden of proof, 260
  causes of death, 259
  circulatory organs, 258
  definition, 255
Infanticide—*continued*
  duty of mother, 255
  evidence, 257
  funis, 257
  hydrostatic test, 258
  identity of mother, 260
  independent existence, 256
  intent, 256
  medical evidence, 257
  natural causes of death, 259
  prevalence, 256
  proof, burden of, 260
  respiratory organs, 258
  statutes, 261
  still-born, 260
  umbilical cord, 257
Infants (*see* Minors), 84, 102, 104, 274
Infection, 133, 175
Infectious disease, 98
Inferences, results, 149
Injunction, 279
Injurious results, 149
Injury in malpractice, 184
Inmates of public hospitals, 288
Inquisition of sanity, 172
Insanity:
  absence of motive, 225
  anger, 231
  burden of proof, 224
  cerebral cortex, 220
  choice, 221
  civil liability, 233 et seq.
  common law, 226
  compensatory damages, 238
  continuity, 224
  contracts, 233
  control, 221, 227
  criminal intent, 226
    law, 226
  damages, 238
  deeds, 236
  definition, 224, 226 et seq.
  degree of proof, 231
  delirium tremens, 229
  delusion, 222, 229, 237
  depravity, 231
  drunkenness, 230, 235
  emotional, 231
  epilepsy, 230
  evidence, 224
  exemplary damages, 238

Insanity—*continued*
  expert, 225
  functional disturbances, 222
  general practitioner, 225
  hallucination, 222
  homicide, 226, 238
  illusion, 222
  impaired faculties, 235
  impulse, 231
  insane delusion, 229
  intellect, 220
  intent, 226
  intoxication, 230, 235
  irresistible impulse, 231
  kleptomania, 232
  knowledge of right, 227
  law, 223
  marriage 234
  memory, 220
  mental capacity, 234, 237
    faculties, 220
  moral, 231
    depravity, 231
  motive, 225
  murder, 226, 228, 229
  necessaries, 233
  particular act, 227
  passion, 231
  perversion, 231
  power of control, 221
  presumption of sanity, 224
  progress of law, 223
  proof required, 231
  purpose, 233
  reason, 226
  reasonable doubt, 231
  right and wrong, 227
  sensibility, 221
  somnambulism, 230
  sound mind and memory, 237
  statutes, 232
  subjects of inquiry, 228
  suicide, 225
  temper, 231
  tests, 226
  torts, 237
  undue influence, 237
  wild beast test, 226
  will, 221
  wills, 236
Instructions, 163
Intellect, 220
Intent in false representations, 202
Intoxicating liquors, 290
Intoxication, 166, 230, 235
  contracts, 235
  crimes, 230
  delirium tremens, 230, 235
  malpractice, 166
  marriage 234
Involuntary relations, 135
Itinerant patients, 71
  physicians, 68
  vendors, 68

J

Joint agreement not to sue, 190
  and several actions, 187, 189
  contribution, 190
  independent acts, 189
  liability, 189
  purchase of peace, 190
  satisfaction, 190
  services, 189
  survival of action, 191
  tort feasors, 189
Judgment, 137, 145
  agreement waiving, 150
  assumption of risk, 150
  best, 145
  correct, 147
  different methods, 147
  dual purpose, 148
  in favor of physician, 180
  mistake, 147
  of court, 180
  presumption, 148
  rule, 138
Jurisdiction, 27
Jurisprudence, 17
  medical, definition, 26
Jury, 30, 289
  service, 289
  trial, 30
    revocation of license, 77
    right, 30

K

Kleptomania, 232
Knowledge of injury, 264
  of pregnancy, 195
  of right, 227

L

Latent injuries, 264
Latitude of discretion, 146
Law, 17, 135
  administrative, 23
  civil, 19, 22
  classes, 19
  criminal, 19
  definition, 17
  malpractice, 179
  municipal, 17
  of the land, 73
  origin, 135
  prevalence, 17
  substantive, 23
Legacies, 290
Legal rights, 27
Liability of city, 273
Liabilities for independent act, 189
Libel, 271, 272, 289
License, 62
  boards, 64, 79
  calling, liberty to pursue, 62
  Christian Science, 69
  City license, 68
  common law right, 62
  constitutional provisions, 73
  control by state, 63
  corporation cannot be licensed, 67
  delegating discretion, 71
  dentistry, physician practicing, 71
  due process, 73
  grounds for revoking, 73
  how regulated, 64
  itinerant physicians, 68
  itinerant vendors, 68
  optician, 71
  police power, 63
  practice, not property, 72
  practicing medicine, what is, 76
  practicing medicine, without, 76
  presumed, 100
  public welfare, 63
  qualifications, 65
  requirements, 65
  reserved rights, 71
  resident practitioner, 71
  revocation, 71
  rights to practice, 62
  soliciting patients, 67
  state may control, 63
  statutes, 63
  vested rights, 72
Limb, fractured, shorter, 149
Limitations, 262
  accrual of cause, 262
  continuing obligation, 265
    wrong, 266
  diligence, 263
  disability, 267
  fee, 266
  knowledge of injury, 264
  latent injuries, 264
  license, 71
  malpractice cases, 262
  minors, 267
  period, 262
  persons under disability, 267
  policy of the law, 262
  specified service, 263
  statutes of, 262
  suit for fee, 266
Liquors, intoxicating, 166, 230
Locality as affecting skill, 141

M

Malingerers, 275
Malpractice, 93, 158
  abortion, 193
  accident, 160
    and negligence, 160
  action, form of, 187
    survival of, 191
  agreement excusing, 150
  agreement not to sue, 190
  anesthetic, 129, 131, 170, 215, 219
  assistance, 155
  assistants, 164, 190
  assumption of risk, 150
  bill, failure to present, 177
  burden of proof, 174
  carelessness, 145, 159
  causes, more than one, 129
  Christian Science, 176
  civil, 158, 200
    rights acts, 169
  communication of disease, 98
  compensation, 105
  contingencies, 185
  contribution, 190
  contributory negligence, 161
  criminal liability, 192

Malpractice—*continued*
  damages, 181
  death from, 188
  defenses, 161, 180
  definition, 158
  dentist, 132
  diagnosis, 170
  different schools, 175
  druggist, 164, 190
  established mode, 152
  excused, never, 145
  exhibiting injury, 177
  experimentation, 152
  expert testimony, 159, 173
  failure to cure, 94, 170
    to obey, 163
  good faith, 160
  gratuitous services, 152
  guarantor, 166
  guess at liability, 175
  how proven, 172
  illustrations, 170
  improper treatment and injury, 158
  independent acts, 189
    treatment, 163
  infection, 133, 175
  infectious disease, 98
  injurious results, 170
  injury, 158
  inquisition of sanity, 172
  instructions, 163
  intent, 160
  intoxication, 166
  joint tort feasors, 189
  law, a question of, 179
  matron, 161, 164
  mistake by patient, 181
    in diagnosis, 170
  mitigation, 186
  negligence, 159
  nurses, 164
  obey instructions, 163
  other causes, 180
    engagements, 166
    vocations, 166
  partners, 165
  patient, negligence of, 161
  preponderance of evidence, 174
  presumptions, 183
  probable causes, 174
  prompt response, 178
  proof necessary, 158, 172
    of reputation, 181

Malpractice—*continued*
  question of law, 179
  recovery, one, 181
  refusal to treat, 167
  relation begins, 178
    ends, 178
    to injury, 158
  release, 191
  reputation, 181
  response to call, 178
  rule, reason for, 162
  sanity, inquisition, 172
  satisfaction of claim, 190
  schools of medicine, 175
  services free, 152
  specialists, 151
  substitute, 165
  suit in tort, 187
    only one, 181
  survival of action, 191
  temperament, 163
  tort, 181, 187, 238
  unlicensed practitioner, 157
  usual results, 172
    treatment, 152
  visits, frequency, 167
  vocations, other, 166
  volunteer, 153
  wrong diagnosis, 170
  X-ray, failure to take, 173
Materiality of representations, 203
Matron, 164
Measure of:
  care, 144
  duty, 136
  skill, 139, 151
Medical books as evidence, 60
  jurisprudence, definition, 26
  services, 102, 274
    beliefs, 275
    Christian Science, 274
    duty to employ, 274
    necessaries, 102, 274
    religious belief, 275
  testimony, subjects of, 54 et seq.
Mental faculties, 220
Methods, different, 147
Minors, 84, 102, 267
  agent of parent, 104
  duty of parent, 274
  medical services, 102, 104
  necessaries, 102

Miscellaneous practitioners, 69
Misconduct, 145
Mistake in diagnosis, 170
  in judgment, 147
Mitigation of damages, 186
Moral character, license, 65
  qualities, 19
Morality, license, 65
Municipal law, 19
    civil, 19, 22
    classes, 19
    conforms to civilization, 19
    crime, 19
    criminal, 19
    definition, 19
Murder, 226, 228, 238

N

Narcotic drugs, 290
Natural causes of death in infanticide cases, 259
Necessaries, 102
  definition, 102
  husband and wife, 102
    selects physician, 102
  medical services, 102, 274
  minors, 102
  mother liable for, 104
  value, 101
Necessary to save mother's life, 198
Necessity, 198, 190, 270
Negligence (*see* Malpractice), 159
  never excused, 145
No cure, no pay, 96
Notice, 28, 78, 178
  jurisdictional, 28
  to revoke, 78
Nudum pactum, 86
Nurse, negligence of, 164

O

Oath, 33
Obey instructions, 163
Objective symptoms, 58
Obligations imposed by law, 135
  liability, 138
Office practice, 167
One suit—one recovery, 181
Operation, agreement, 109
  consent, 110, 111, 116
  controlling facts, 115
  departure, 117
  emergent, 90, 112, 115
Operation—*continued*
  presumptions, 114
  prohibited act, 119
  publishing, 155
  request of patient, 117
  unauthorized, 110, 117
Operator's duty, 114
Opinion evidence, 34
Opinions, 34, 204
  basis, 57
  effect, 53, 101
  expert witness, 35
  not favored, 35
  ordinary witness, 34
  reasons for admitting, 54
  representation, 204
  special knowledge, 54
  subject-matter, 35
  weight, 36
Optician, 71
Ordeal, trial by, 31
Ordering patient to hospital, 179
Ordinary witness, 34
Oxy-hemoglobin, 245

P

Pain, statement of, 58
Pardon, 80
Parent and child, 102, 104, 274
Particular mode of treatment, 152
Patient's negligence, 161
  right, 116
Pay (*see* Compensation), 92
Peace, purchase of, 190
Pecuniary circumstances:
    of patient, 99
    of physician, 99
Penalizing beliefs, 21
Penalties, 20
Period of pregnancy, 195, 196
Physician and dentist, 164
Physician and tort feasor, 189
Physicians and courts, 25, 54
  as experts, 54
Plasma, 244
Platelets, 244
Poisoning, 252
  absorption, 252
  common law, 253
  definition, 252
  malice, 252
  murder by, 254
  post-mortem, 253

Police power, 63, 283, 285
Policy of the law, 198, 263
Post-mortem, 49, 107, 253, 271
Practice confined to office, 167
  corporation cannot, 67
  is not property, 72
Practicing medicine, what is, 76
Practitioner, not guarantor, 166
Pregnancy, 54, 195
Preponderance of evidence, 174
Presumption of good faith, 51
Presumptions:
  absorbent gauze cases, 130, 265
  broken jaw, 132
  brooch in tooth, 132
  care, 148
  cause and effect, 125
  definition, 126
  different causes, 129
  endowments, faculties, 175
  fact, 126
  failure to cure, 148 et seq.
    to discover rupture, 149
  gauze cases, 130, 265
  illustrations, 128, 149
  infection, 133
  injurious results, 149
  insanity, 226, 233
  judgment, 137, 145
  kinds, 126
  law, 126
  license, when, 100
  life, continuing, 196
  negligence, 159
  other causes, 129
  physical endowments, 183
  results injurious, 149
  sanity, 224
  skill, 148
  sponge cases, 130
  strength of, 126
  surgical operations, 114
  tooth down throat, 132, 149
  upon presumption, 127
  X-ray burns, 130
Prevalence of infanticide, 256
  of law, 17
Prevent aggravation of damages, 184
Preventing procreation, 281
Privacy, imposing upon, 154
Privileged communications, 46
    at common law, 46
Privileged communications—*continued*
    autopsy, 49
    criminal purpose, 51
    criminals, 50
    definition, 46
    duty of physician, 50
    entirety, 49
    good faith, 51
    incidentals, 48
    interpretation of statutes, 47
    party to suit, 48
    physician to patient, 48
    presumption of good faith, 51
    privacy, 154
    provisions of statutes, 46
    publishing operation, 154
    purpose of statutes, 46
    statutes, 46
    waiver of privilege, 49
Procedure, 28
Proceedings to revoke license, 77
Process, due, 73
Processes, 29
Procreation, 281
Professional character, 99
  standing, 99
Progress, 151
Proof of reputation, 181
Proper treatment required, 94
Property, practice is not, 72
Public hospitals, 288
  necessity, 63
  policy, 63, 137, 262
  schools, vaccination, 285
  welfare, 63
Publishing operation, 154
Punishments, 20, 21, 250, 280
Purchase of peace, 190
Purpose of diagnosis, 170, 171
  of laws, 61

Q

Qualification:
  expert, 53
  license, 65
Qualities of acts, 19
Question, hypothetical, 57
Quick with child, 193

R

Rape, 250
  age of consent, 250

Rape—*continued*
  anesthetic, 251
  chastity, 251
  consent, 250
  definition, 250
  force, 251
  fraud, 251
  hymen, 252
  hypnotic influence, 251
  physical violence, 251
  punishment, 250
  rupture of hymen, 252
  signs of, 251
  threats, 251
  violence, 251
Ratification, 104
Receipt, 88
Recommendation of physician, 166
Recovery, one, 181
Red corpuscles, 243
Refusal to take case, 167
Relation:
  begins, 178
  ends, 178
Relations:
  involuntary, 135
  voluntary, 135
Release, 89, 191
Relief, 170
Religious belief, 275
Representations, false (*see* False representations), 202
Reputation, 181
Requirements for license, 65
Res gestæ, 43
Res ipso loquitur, 125
  applicable, when, 128
  applicable, when not, 128
  application, 128
  basis, 125
  broken jaw, 132
  brooch in tooth, 132
  cause and effect, 125
  convictions, 127
  definition, 125
  dentists, 132
  different causes, 129
  effect and cause, 125
  gauze cases, 130
  history, 128
  illustrations, 128
  infection, 133
Res ipso loquitur—*continued*
  jaw broken, 132
  maxim, 125
  mental convictions, 127
  operations, 114
  other causes, 129
  physicians, 130
  presumptions, 126
  probable causes, 132
  reason, 128
  several causes, 129
  sponge cases, 130
  submaxillary, broken, 132
  X-ray cases, 130
Respondeat superior, 287
Response to call, 178
Restraint of practice, 277
  ancillary, 277
  assignees, 278
  employment, 277
  illustrations, 279
  injunctions, 279
  not favored, 277
  prevalence, 277
  provisions, 278
  reasonable, 279
  relief, 278
  space limit, 279
  specific performance, 278
  time, 278
  validity, 277
  written contract, 278
Results, 149, 172
Revocation of license, 71
  charges, 77
  criminal prosecution, 80
  decision, effect of, 79
  defense, 79
  due process, 73
  evidence, 79
  grounds, 73
  hearing, 77
  jury trial, 79
  limitations, statutes of, 80
  notice, 78
  pardon, 80
  proceedings, 77
  record, 79
  reserved right, 72
  statutes of limitations, 80
  trial by jury, 79
  vested right, 72

Right and wrong, 19
  legal, 27
  of physician to practice in public hospital, 288
  to contract, 87
Rights:
  constitutional, 87
  in courtesy, 27
  in personam, 27
  in rem, 27
  in trust, 27
  vested, 72
Risk, assumption of, 150
Rules of evidence, 38, 46
Rupture of hymen in rape, 252

S

Salpingectomy, 280
Sanity, inquisition, 172
Satisfaction, 190
School boards employing health officers, 286
Schools of medicine, 175
  public, vaccination, 283
Selection of hospital, 166
Sensibility, 221
Services during life of patient, 96
  free, 152
Shock, 240
Signs of rape, 251
Skill, 139
  agreement excusing, 150
  ailment treated, 142
  assumption of risk, 150
  average, 141
  best, 140
  burden of proof, 174
  competent, considered, 141
  definition, 139
  degree, 139 et seq.
  disease treated, 142
  dual purpose, 148
  educated physicians, 141
  established mode, 152
  experimentation, 152
  failure to cure, 170
  generality of requirement, 138
  gratuitous services, 152
  highest, 140
  implied, 136
  inference of want of, 142
  injurious results, 147
Skill—*continued*
  liability, 138
  locality, 141
  measure, 139
  non-professional, 153
  obligations, 135
  ordinary, 140
  presumption, 148
  progress, 151
  proofs, 142
  public policy, 137
  publishing operation, 154
  reasonable, 139
  relative term, 139
  results, 149
  special agreement, 150
    claims, 150
  specialists, 151
  test, 139
  time, 141, 143
  unlicensed practitioner, 157
  usual, 172
  volunteer, 153
  waiving requirement, 150
Slander, 272, 289
Soliciting patients, 67
Somnambulism, 230
Sound mind and memory, 237
Special agreement, 150
Specialists, 151
Specific performance, 278
Specified services, 263
Spectacles, sale of, 64
Sponge case, surgical operation, 130, 265
Stain, 247
Standing of physician, 99
Statements:
  adverse, 51, 52
  against interest, 51
  by physician, 48
  confidential, 46
  in presence, 51
  pain, 44, 58
  privileged, 46
  res gestæ, 43
  suffering, 44
  to physician, 43
Statutes of limitations, 262
Statutory provisions for vaccination, 284
Sterilization, 280

Still-born, 260
Subjective symptoms, 58
Subjects of medical testimony, 55
Subpœna, 30
Substantive law, 23
Substitute, malpractice, 165
Suffering, statement of, 44
Summary re sterilization, 283
Summons, 29
Suit for fee, 266
Sunday, 268
  common law, 268
  duration of day, 268
  origin of statutes, 269
Surgeon, 109
Surgeon's discretion, 113
Surgical operation, 109
Survival of action, 191
Symptoms, 58
  objective, 58
  subjective, 58

T

Temperament, as affecting malpractice, 163
Testimony, 33, 35, 219
  subjects of medical, 55
Tests:
  care, 144
  for blood, 246
  insanity, 226 et seq.
  judgment, 138
  skill, 139
Time as affecting skill, 141, 143
Tort feasors, 189
Torts of insane persons, 237
Treatment, one mode, 152
Tremens, 229, 235
Trial, 30, 31
  jury, 30
  ordeal, 31
  witches, 55
Trust, 205
Typhoid carrier, 272

U

Unauthorized autopsy, 123
  operation, 110, 117, 123
Unchastity in rape cases, 251
Unconscious patient, 90, 112, 115
  fee for services, 90
  operation, 110
Unlicensed physician:
  compensation, 100
  malpractice, 157
  qualifications, 65
Unreasonable requirements for license, 66
Unusual punishment, 280
Usual results, not sufficient, 172

V

Vaccination, 283
Validity of contracts, 86, 277
Value of services, 97
Vasectomy, 280
Vendors of medicine, 68
Vested rights, 72
Violence in rape, 251
Visits, frequency of, 97
Voluntary relations, 135
Volunteer, 153

W

Waiver of care, skill, etc., 150
Waiver of privilege, 49
Weight of evidence, 37, 53
White corpuscles, 244
Will, a mental faculty, 220, 221
Wills, 236
Witches, 55
Witness, 33
Witness fees, 106
Work on Sunday, 268
Wounds, 239
Written contract, 83
Wrong, 19
Wrong, continuing, 266
Wrong diagnosis, 170 et seq.

X

X-ray cases, 130, 151, 173, 177
X-ray in diagnosis, 173, 177

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